

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

----- DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.,  Petitioners, v. CHAD EVERET BRACKEEN, ET AL.,  Respondents. -----	)	No. 21-376
CHEROKEE NATION, ET AL.,  Petitioners, v. CHAD EVERET BRACKEEN, ET AL.,  Respondents. -----	)	No. 21-377
TEXAS,  Petitioner, v. DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.,  Respondents. -----	)	No. 21-378
CHAD EVERET BRACKEEN, ET AL.,  Petitioners, v. DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.,  Respondents. -----	)	No. 21-380

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Date: November 9, 2022

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24 Washington, D.C.  
25 Wednesday, November 9, 2022

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

MATTHEW D. MCGILL, ESQUIRE, Washington, D.C.; on behalf of Chad Everet Brackeen, et al.

JUDD E. STONE, II, Solicitor General, Austin, Texas; on behalf of Texas.

EDWIN S. KNEEDLER, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the federal parties.

IAN H. GERSHENGORN, ESQUIRE, Washington, D.C.; on behalf of the tribal parties.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF:	PAGE:
3	MATTHEW D. MCGILL, ESQ.	
4	On behalf of Chad Everet Brackeen,	
5	et al.	4
6	ORAL ARGUMENT OF:	
7	JUDD E. STONE, II, ESQ.	
8	On behalf of Texas	55
9	ORAL ARGUMENT OF:	
10	EDWIN S. KNEEDLER, ESQ.	
11	On behalf of the federal parties	103
12	ORAL ARGUMENT OF:	
13	IAN H. GERSHENGORN, ESQ.	
14	On behalf of the tribal parties	162
15	REBUTTAL ARGUMENT OF:	
16	MATTHEW D. MCGILL, ESQ.	
17	On behalf of Chad Everet Brackeen,	
18	et al.	203
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
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12  
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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 21-376, Haaland versus Brackeen, and the consolidated cases.

Mr. McGill.

ORAL ARGUMENT OF MATTHEW D. MCGILL  
ON BEHALF OF CHAD EVERET BRACKEEN, ET AL.

MR. MCGILL: Thank you, Mr. Chief Justice, and may it please the Court:

According to the federal government, in 2020, there were over 11,000 Native American children in state foster care. The Indian Child Welfare Act deprives Native -- deprives Indian children of the best interests of the child test. It replaces that test with a hierarchy of placement preferences that puts Native -- non-Indian families at the bottom of the list.

As this Court explained in Holyfield, this effectuates a federal policy of sending Indian children to the Indian community. The problem is -- is that there are fewer than 2,000 Native American foster homes. That means each year hundreds, if not thousands, of Indian children are placed in non-Indian foster homes,

1 and sometimes there they bond with those  
2 families. Yet, when those families try to adopt  
3 those children, ICWA rears its head for a second  
4 time, allowing tribes to play the proverbial  
5 ICWA trump card at the eleventh hour.

6 This is happening now for a second  
7 time to the Brackeens as they try to adopt YRJ,  
8 who is now four-and-a-half years old. For a  
9 second time, the Brackeens are asked to show  
10 good cause to overcome the placement preferences  
11 under a new regulatory standard that, in the  
12 agency's words, is narrow, limited, and not a  
13 best interests test. Not even YRJ's deep  
14 attachment to the Brackeens after being part of  
15 their family for four years is sufficient. For  
16 both that child and her family, this flouts the  
17 promise of equal justice under the law.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Would you spend a  
20 minute on what the good cause standard is? I  
21 think -- of course, you understand that there's  
22 already a placement, there's already adoption in  
23 process, but how does that work?

24 MR. MCGILL: Justice Thomas, the --  
25 after the 2016 rule, what the -- at 25 C.F.R.

1 23.132, you now -- there are now five enumerated  
2 ways in which good cause can be shown. The  
3 government says that it mere -- that the  
4 regulation merely says that it should be one of  
5 these five factors. But, you know, a remarkable  
6 thing happens when a family court judge in the  
7 states picks up a copy of the Code of Federal  
8 Regulations. He treats it as binding federal  
9 law. And that is how it happens on the ground.  
10 It is treated as enumerated things that must be  
11 shown.

12 Further, it excludes any consideration  
13 of socioeconomic circumstances of the -- of the  
14 competing families. And, finally, it says that  
15 what the regulation describes as ordinary  
16 bonding and attachment that arises from a  
17 placement that's in violation of ICWA's  
18 placement preferences shall not be a sufficient  
19 or sole basis for showing good cause.

20 And, of course, the child at issue in  
21 these proceedings has no stake in whether she or  
22 he was placed in supposed violation of ICWA's  
23 preferences at the foster care -- at the foster  
24 care process.

25 JUSTICE SOTOMAYOR: Counsel, you

1 haven't challenged the regulation?

2 MR. MCGILL: Yes, we have, Your Honor.

3 We have a challenge to --

4 JUSTICE SOTOMAYOR: But not in the  
5 cert granted question?

6 MR. MCGILL: Your Honor, we challenged  
7 the -- we raised a challenge in our complaint to  
8 the --

9 JUSTICE SOTOMAYOR: I'm not asking  
10 about the complaint. The cert granted question  
11 does not include challenges to the regulation?

12 MR. MCGILL: It -- it challenges the  
13 --

14 JUSTICE SOTOMAYOR: It opposes the  
15 statute?

16 MR. MCGILL: We challenged the  
17 regulation as an unconstitutional -- as an  
18 implementation of a --

19 JUSTICE SOTOMAYOR: Counsel, answer  
20 the question. Is it part of the question  
21 presented or not?

22 MR. MCGILL: I believe it is, Your  
23 Honor.

24 JUSTICE SOTOMAYOR: Did you seek cert  
25 on that question?



1           MR. MCGILL: We did not seek cert on  
2 the question of whether it is a permissible  
3 construction of the statute. We sought cert on  
4 whether the statute --

5           JUSTICE SOTOMAYOR: So, if -- if you  
6 don't seek cert on that, there's nothing on that  
7 good cause standard?

8           MR. MCGILL: I don't -- I don't think  
9 so, Your Honor.

10          JUSTICE SOTOMAYOR: Counsel, can I  
11 turn to something you said, which was it  
12 displaces the best interests of the child  
13 standard. In most state custody proceedings,  
14 the best interests of the child is what guides  
15 those decisions.

16          Yet, we have the Hague Convention on  
17 the abduction of children that basically says to  
18 the court you can't make that determination, you  
19 have to send the child back, and it gives a  
20 session -- section of exceptions, et cetera, and  
21 it even says standards of proof, et cetera.

22          Why is this case any different than  
23 the Hague Convention?

24          MR. MCGILL: For, I think, a couple of  
25 reasons, Your Honor. First, the Hague

1 Convention, as I understand it, would send the  
2 child back to their place of their habitual  
3 residence.

4 JUSTICE SOTOMAYOR: But that's not  
5 necessarily in the best interests of the child.  
6 There's no best interests standard there.

7 MR. MCGILL: What I was -- if I might  
8 just finish my thought, Your Honor. That is --  
9 that habitual residence standard is -- is  
10 essentially duplicated in Section 1911(a), which  
11 provides for tribes -- tribal courts to have  
12 exclusive jurisdiction concerning children who  
13 are domiciled on -- on tribal lands.

14 So I think that -- that that parallels  
15 the Hague Convention. The other --

16 JUSTICE SOTOMAYOR: Well, how?  
17 Meaning these children are in the U.S., they  
18 have a relationship with an Indian tribe over  
19 which we have recognized for over two centuries  
20 Congress has plenary -- plenary authority.

21 If Congress in one enumerated power  
22 can supersede a state standard, why can't it in  
23 another?

24 MR. MCGILL: Well, Your Honor --

25 JUSTICE SOTOMAYOR: They can say the

1 best interests of the child shouldn't be the top  
2 test or only test, either good cause or  
3 something else, as ICWA does.

4 Why is that beyond Congress's power?

5 MR. MCGILL: I'm not aware that an  
6 equal protection challenge has ever been  
7 presented to the Hague Convention. If you -- if  
8 you're referring --

9 JUSTICE SOTOMAYOR: You -- you -- you  
10 think that Congress's foreign affairs powers  
11 don't permit it to legislate with respect to the  
12 relationships of a foreign country and its  
13 competing custody issues?

14 MR. MCGILL: Your Honor, I think the  
15 foreign affairs power is subject to the Fifth  
16 Amendment. I think the question of whether  
17 citizenship is a -- would be -- would rise to  
18 the level -- a classification based on  
19 citizenship would amount to race discrimination  
20 would, you know, essentially be the question of  
21 whether citizenship is being used as a proxy for  
22 race. The government --

23 CHIEF JUSTICE ROBERTS: Counsel, to  
24 what extent is the best interests of the child  
25 or the same considerations that are taken into

1 account under the best interests of the child  
2 incorporated in the good cause showing that  
3 could be made under ICWA?

4 MR. MCGILL: I would say that they are  
5 not, Your Honor. I mean, the -- the good cause  
6 standard is -- is a holistic standard that takes  
7 all of the child's circumstances and needs into  
8 account.

9 What the good cause standard does is  
10 sharply limit that under the 2016 rule to  
11 enumerated factors. In 2013, when the adoptive  
12 couple case was before this Court, the  
13 government described the good cause standard as  
14 a safety valve. That's Footnote 2 of its brief.

15 It is no longer a safety valve. The  
16 Interior Department has promulgated these  
17 regulations with the specific purpose of making  
18 it limited, narrow, and, in its own words, not a  
19 best interest test. So it differs very much  
20 from the -- what would be the traditional best  
21 interest test.

22 CHIEF JUSTICE ROBERTS: So how do you  
23 understand this to work? I mean, if you have,  
24 for example, an Indian couple, non-tribal  
25 members of the -- the tribe of the child,

1 exactly how does the state court adoption  
2 authority take into account -- how -- how -- how  
3 do they weigh the interests of the non-family  
4 tribe member against -- you say you don't take  
5 into account the best interests of the child?  
6 What are you weighing on the other side?

7 MR. MCGILL: Well, I think you could  
8 look to the Texas court of appeals decision in  
9 the YRJ case as just an example of this. So the  
10 question is whether -- whether the person  
11 challenging the placement preference has shown  
12 one of the enumerated factors by, at that time,  
13 clear and convincing evidence.

14 That -- that standard of proof has  
15 since fallen by the wayside. So that's how it  
16 -- it plays out on the ground. Is one of those  
17 five factors demonstrated by a preponderance of  
18 the evidence?

19 It doesn't -- you know, it -- it does  
20 not -- those five factors don't take into  
21 account the bonding or attachment of the child,  
22 which would be the most obvious and most  
23 compelling part of the best interest standard.  
24 It only says if there's, you know, a showing of  
25 extraordinary needs that -- that -- that is, you

1 know, not just something that is from what the  
2 regulation describes as ordinary bonding and  
3 attachment that good cause can be shown.

4 I mean, after the 2016 regulation, the  
5 -- the placement preferences are effectively  
6 dispositive in many cases.

7 JUSTICE BARRETT: Counsel, can I take  
8 you to the scope of the Indian power? We have  
9 described it as plenary. It's quite broad. And  
10 in area after area, we've -- well, the -- we've  
11 allowed Congress to far exceed anything that we  
12 would think of as just commerce in the sense of  
13 trade, you know, which is something that you  
14 floated.

15 Are you asking us to overrule all of  
16 those precedents?

17 MR. MCGILL: No, Your Honor. I -- I  
18 am not going to speak for my colleagues on the  
19 -- from the State of Texas, but, for our -- for  
20 our part, no, we're not -- we don't think you  
21 need to overrule any of the precedents.

22 JUSTICE BARRETT: Because you'd have  
23 us just focus on the equal protection?

24 MR. MCGILL: No, Your Honor. I mean,  
25 on -- on the Article I piece, the -- this cannot

1 be understood as within the -- the Court's  
2 Indian Commerce Clause precedents. It's not  
3 commerce in any -- in any normal sense of that  
4 word.

5 The question is then whether it is  
6 part of the plenary power that otherwise has  
7 been described in this Court's precedents. And  
8 our submission is that that plenary power is, if  
9 -- if you -- in the Court's cases, as elaborated  
10 in this Court's cases, that plenary power  
11 applies to the tribe's areas of its sovereign  
12 interests, tribal lands, treaty powers, its  
13 internal affairs, its ability to self-govern.

14 It's not a power to regulate Indians  
15 everywhere, wherever they might be in the  
16 jurisdiction of the United States.

17 JUSTICE SOTOMAYOR: So what do you do  
18 with that line of cases, like the Act of 1888,  
19 setting the evidentiary standard for proving a  
20 marriage in cases involving an Indian woman and  
21 a white man? That wasn't limited territorially.  
22 That set an evidentiary standard.

23 Or the Trade and Intercourse Act of  
24 1834 set burdens of proof in all trials, whether  
25 on reservations or outside of reservations,

1 about property rights between Indians and  
2 non-Indians.

3 The Act of 19 -- 1799, state courts  
4 must take proper bail when federal officers  
5 detain offenders who trespassed into Indian  
6 territory.

7 So that one arguably had something to  
8 do with that, but there's a legion of cases, as  
9 Justice Barrett alluded to, where Congress has  
10 gone off of Indian lands, had nothing to do with  
11 sovereignty, had to do -- nothing to do with  
12 trade or commerce -- or commerce, but with  
13 intercourse, with the relationship with Indians,  
14 whether on or off reservations.

15 MR. MCGILL: Well, Your Honor, I -- I  
16 guess my -- I would have two parts to my  
17 response.

18 The first is that the -- the  
19 Constitution confers an authority to regulate  
20 commerce, and that power, as understood, as  
21 Justice Thomas's separate opinion in *Adoptive*  
22 *Couple*, I think, would elaborate --

23 JUSTICE SOTOMAYOR: But that was a  
24 separate opinion. We described the power as  
25 more plenary than that.



1           MR. MCGILL: Well, I -- and I think  
2 this is just the -- the fundamental portion of  
3 my submission, and I respect the fact that we  
4 might not agree on this, but that there is a  
5 commerce power that -- that allows the  
6 government to regulate commerce wherever it  
7 happens within the United States.

8           And then there is, in addition to  
9 that, a plenary power that allows the tribes --  
10 allows the government, the federal government,  
11 to regulate the tribes, and that arises from the  
12 federal government's, you know, role as the  
13 subjugating sovereign of the tribes and its role  
14 as the, now under Kagama, the protector of those  
15 tribes. But that power is not unlimited. It  
16 doesn't --

17           JUSTICE JACKSON: Well, why --

18           JUSTICE GORSUCH: Counsel --

19           JUSTICE JACKSON: -- is it limited by  
20 geography? You -- you're suggesting that the  
21 power, the plenary power that you describe is  
22 limited by the tribal land demarcation, and I  
23 don't understand where that comes from.

24           MR. MCGILL: Well, I -- I don't think  
25 it's just tribal land, Your Honor, although, as

1 this Court's decision in Plains Commerce Bank  
2 says, that is the -- the core of tribes'  
3 sovereign interests, but it also would extend to  
4 treaty rights, the internal affairs of the  
5 tribe, and the laws that -- that address the  
6 scope and form of tribe self-government.

7 JUSTICE JACKSON: All right. So you  
8 concede that Congress has plenary power over  
9 tribal sovereignty and self-government then?

10 MR. MCGILL: Tribe -- I believe that  
11 Congress absolutely has the power to -- to  
12 adjust and change the scope of tribes' power to  
13 govern themselves.

14 JUSTICE JACKSON: All right. So what  
15 do we do with the legislative history in regard  
16 to this Act in which Congress repeatedly  
17 referred to the kinds of -- of restrictions and  
18 regulations in this area in ICWA as a matter of  
19 tribal governance and self -- you know,  
20 self-government and sovereignty?

21 I mean, Congress said things like  
22 there's no resource that is more vital to the  
23 continued existence and integrity of Indian  
24 tribes than their children. They constantly  
25 cast regulations regarding children, Indian

1 children, as a matter of tribal integrity,  
2 self-governance, existence. So why isn't that  
3 enough to bring it within the -- the -- the  
4 scope of their plenary power?

5 MR. MCGILL: Addressing the tribal  
6 existence point, I have four responses to that.

7 The first is that the third placement  
8 preference doesn't even rationally advance that  
9 objective. Placing a Seminole child with a  
10 Cherokee family doesn't rationally advance the  
11 existence of either tribe.

12 The second point is that placement  
13 does not dictate membership. You need only look  
14 as far as YRJ to show that. Tribes --

15 JUSTICE JACKSON: Right. I feel like  
16 you're in the weeds of the actual regulation.  
17 What I'm asking you is the broader question  
18 about whether or not Congress has the ability to  
19 regulate in this area.

20 MR. MCGILL: So --

21 JUSTICE JACKSON: I understood your  
22 response to Justice Barrett to be not anything  
23 outside of commerce or the plenary power  
24 expanding to or extending to self-governance and  
25 self-regulation. So I'm just asking as a matter

1 of categorization why aren't regulations that  
2 concern whether or not Indian children are going  
3 to remain in the tribes fitting within that  
4 plenary power?

5 MR. MCGILL: Your Honor, in Williams  
6 versus Lee, this Court described the power of  
7 self-government as the power of reservation  
8 Indians to make their own laws and to be ruled  
9 by them. ICWA has nothing to do with that.

10 JUSTICE GORSUCH: Counsel --

11 MR. MCGILL: What --

12 JUSTICE GORSUCH: -- counsel, I'm  
13 struggling to understand your argument. For the  
14 first half of it, I heard policy complaints. It  
15 took a while for me to even hear the words equal  
16 protection or Article I.

17 And I guess I'm curious, first of all,  
18 which do you think is your better argument --

19 MR. MCGILL: We're --

20 JUSTICE GORSUCH: -- legally? Not --  
21 not -- the policy arguments might be better  
22 addressed across the street.

23 MR. MCGILL: Justice Gorsuch, as you  
24 -- we are here to advance both arguments, but  
25 I'd like to talk about the equal protection

1 argument.

2 JUSTICE GORSUCH: Okay. So, if equal  
3 protection is your better argument, what do we  
4 do about your standing problem? You've sued  
5 federal officials, not the state courts who  
6 actually are tasked with operating.

7 MR. MCGILL: I -- I think my answer to  
8 that, Justice Gorsuch, starts with the  
9 traceability standard, which is de facto  
10 causation. And then I would say --

11 JUSTICE GORSUCH: No federal official  
12 can dictate to a state family court what to do,  
13 can he?

14 MR. MCGILL: I'm sorry, I did not hear  
15 the question.

16 JUSTICE GORSUCH: Can any federal  
17 official that you sue tell a state court what to  
18 do?

19 MR. MCGILL: No, Your Honor.

20 JUSTICE GORSUCH: Okay. I would think  
21 that might be the end of it. What am I missing?

22 MR. MCGILL: Two things, Your Honor.  
23 First is the fact that the traceability standard  
24 is de facto causation. And, as shown in the  
25 Court's decision in Bennett versus Spear, the --

1 the agency that issues the regulation is the de  
2 facto cause of a separate party that implements  
3 it. That is what's going on here.

4 JUSTICE GORSUCH: We have a statute.  
5 You're asking us to enjoin somebody from  
6 operating a statute.

7 MR. MCGILL: We also are --

8 JUSTICE GORSUCH: And the only people  
9 who operate the statute are state court judges  
10 --

11 MR. MCGILL: We're --

12 JUSTICE GORSUCH: -- and tribal  
13 judges.

14 MR. MCGILL: We also are asking the  
15 Court to affirm the judgment vacating the 2016  
16 rule on the grounds that it implements an  
17 unconstitutional statute.

18 JUSTICE GORSUCH: And then, in equal  
19 protection --

20 MR. MCGILL: And that would provide --

21 JUSTICE GORSUCH: Fine. Let's say  
22 you've got standing. I'm -- I'll spot you that  
23 for the purposes of this question. How is this  
24 an invidious racial classification rather than a  
25 political classification?

1            Tribes are -- are mentioned in the  
2            Constitution, and, in fact, we have the treaty  
3            power which mentions tribes as separate,  
4            indicates that they're separate sovereigns.

5            MR. MCGILL: Your Honor, the Court  
6            explained in Rice versus Cayetano that tribal  
7            classifications cannot be used in regulation of  
8            state affairs. It drew a line between the  
9            regulation -- the use of tribal classifications  
10          in regulating tribal internal affairs and  
11          regulating the affairs of the state.

12          JUSTICE GORSUCH: You agree that the  
13          Congress can treat with tribes, right?

14          MR. MCGILL: Of course, Your Honor.

15          JUSTICE GORSUCH: Of course. And, in  
16          Mancari, we held this was a political  
17          classification, right?

18          MR. MCGILL: With respect to the  
19          hiring preference there at issue.

20          JUSTICE GORSUCH: Yeah. Okay. So  
21          let's turn to your Article I, and I'm struggling  
22          to understand what it is because you seem to --  
23          I'm sorry. I'll -- I'll -- I'll carry on later,  
24          Chief.

25          CHIEF JUSTICE ROBERTS: Sure.

1 JUSTICE GORSUCH: Yeah.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Thomas?

4 JUSTICE THOMAS: Briefly, counsel, is  
5 there a difference between regulating a tribe or  
6 tribal affairs and regulating someone who  
7 happens to be Indian?

8 MR. MCGILL: Your Honor, I think it  
9 depends on the context. Somebody who -- if you,  
10 by the word "Indian" --

11 JUSTICE THOMAS: Well, in this case,  
12 what -- I mean, I -- I don't want to get the  
13 whole range. We're talking about children who  
14 do not reside on a reservation, right?

15 MR. MCGILL: They are covered by the  
16 statute, yes.

17 JUSTICE THOMAS: Who are not  
18 necessarily members of a tribe?

19 MR. MCGILL: Correct, Your Honor.

20 JUSTICE THOMAS: And that's what I'm  
21 interested in. Is there a difference between  
22 regulating a tribe or a reservation and  
23 regulating someone who happens to be -- have  
24 some Indian blood?

25 MR. MCGILL: Your Honor, I -- I would



1 submit certainly not in this case. Congress  
2 here told us what it was doing. It was  
3 identifying a class of persons who had blood in  
4 common. That's at page 20 of the House report.  
5 It wanted to put that class of people in the  
6 Indian community writ large.

7 JUSTICE THOMAS: I don't think that's  
8 what I'm asking. And I'll stop with this. What  
9 I'm asking is, assuming there is plenary  
10 authority for the national government to treat  
11 with or regulate tribal affairs and affairs on  
12 reservations or related to reservations, is  
13 there a difference when someone happens to be an  
14 Indian not on a reservation, not a part of a  
15 tribe, not associated with a tribe? Do we  
16 consider them the same, or do we consider them  
17 differently?

18 Because that someone is also a citizen  
19 of the United States. And I'm asking you, are  
20 we to just put them all in one ball simply  
21 because you can regulate tribal affairs?

22 MR. MCGILL: No, Your Honor, because,  
23 you know, at least in Mancari itself, it  
24 recognized that the -- that the hiring  
25 preference there was limited to tribal Indians.

1 And, there, the Court recognized that Mancari --  
2 the hiring preference was a -- in a sui generis  
3 agency that had a special relationship in the  
4 governance of tribes qua tribes.

5 And this, I think, is perhaps the --  
6 you know, addresses the point of your question.  
7 There is a difference between regulating tribes  
8 as a polity and regulating persons who happen to  
9 have tribal blood as persons.

10 CHIEF JUSTICE ROBERTS: Justice Alito?  
11 Justice Sotomayor, anything further?

12 JUSTICE SOTOMAYOR: You're not  
13 suggesting, but I think you may be, that  
14 Congress's power is only with respect to tribes  
15 and not Indians? They can't regulate the  
16 relationship between Indians and others, whether  
17 they're on the tribe or not? So all those laws  
18 I read about previously at the founding, they  
19 were unconstitutional to start with?

20 MR. MCGILL: Your Honor, I --

21 JUSTICE SOTOMAYOR: Because they had  
22 nothing to do with reservations. They had to do  
23 with individuals.

24 MR. MCGILL: I think, you know, some  
25 of the laws you cited, I think, have, you know,

1 serious equal protection problems, including,  
2 for instance, there's a law that's still on the  
3 books that provides for the federal government  
4 to forcibly enroll Indians in boarding schools.  
5 That's 25 U.S.C. 302. So there are some serious  
6 equal protection problems in some of the cases  
7 that you cited --

8 JUSTICE SOTOMAYOR: That might be --

9 MR. MCGILL: -- the statutes.

10 JUSTICE SOTOMAYOR: -- but that has  
11 nothing -- that doesn't talk to us about what  
12 you're suggesting in answer to Justice Thomas,  
13 which is that the plenary power is limited to  
14 dealing with tribes and not -- not the treatment  
15 of individual members.

16 MR. MCGILL: What I was talking about  
17 with Justice Thomas, Your Honor, is how -- the  
18 -- the difference of a political classification  
19 and a racial classification. And I -- the --  
20 the -- our submission is that a classification  
21 is political when it -- when it regulates the  
22 tribe's, you know, sovereign interests, which is  
23 to say regulating the tribe as a polity. When  
24 it regulates Indian land, its treaty rights --

25 JUSTICE SOTOMAYOR: So you're saying

1 yes, they can't do -- only -- only individuals  
2 has to do with the limited sovereignty question?  
3 Is that what you're saying?

4 MR. MCGILL: As an equal protection  
5 matter.

6 JUSTICE SOTOMAYOR: Okay.

7 MR. MCGILL: Whether it --

8 JUSTICE SOTOMAYOR: I understand your  
9 argument.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: I'm not sure I do, so  
12 I'm going to continue on the same vein.

13 We have a long history of cases where  
14 we've understood legislation relating to the  
15 tribes as -- as political in nature and not as  
16 racial. I think you have one case, which is  
17 Rice.

18 And so I want to, on the one hand, say  
19 what do you do with this long line of cases  
20 which has consistently said, when you regulate  
21 the tribes, you're regulating political  
22 entities?

23 And then, on Rice, you know, a very  
24 different situation. Number one, a Fifteenth  
25 Amendment case not involved here, right to vote,

1 but even more important than that, really, the  
2 classification did not relate to a tribe; it  
3 related to some centuries' old affiliation with  
4 Native Hawaiians, which was much harder to  
5 understand as a current-day political entity.

6           So -- so I guess I think Rice doesn't  
7 do much for you, and then all these other cases  
8 really knock the legs out from this argument,  
9 and I'm wondering whether you would comment on  
10 that thought.

11           MR. MCGILL: Sure. Let me start with  
12 Rice. I think Rice does explain those -- that  
13 long line of cases that you refer to. It cites  
14 them, you know, I think, at page 519. It cites  
15 Moe, Fisher, Antelope. This is the line of  
16 cases that I think you're referring to, and  
17 these are cases that deal with tribes' sovereign  
18 interests in Indian lands, treaty rights --  
19 that's the fishing vessel case -- the ability of  
20 Indians to govern themselves -- that's Fisher --  
21 and its internal affairs.

22           That is the -- that is the line that  
23 -- that Rice drew and how Rice understood  
24 Mancari and the line that Mancari itself drew.  
25 This -- this distinction that I'm drawing is

1 rooted in Mancari itself because Mancari says  
2 that it would be a much more difficult question  
3 if the hiring preference there extended to the  
4 whole of the federal government.

5 JUSTICE KAGAN: I mean, Mancari is  
6 such a different sort of case, right? Mancari  
7 is Indians are -- are in a long list of other  
8 racial classifications. It was quite clear that  
9 -- that was the BIA one, is that right?

10 MR. MCGILL: Yes, that's correct.

11 JUSTICE KAGAN: Yeah, okay, I'm sorry.  
12 I was -- you -- I was mistaken.

13 But I -- I guess, again, I'm sort of  
14 struggling with how different the classification  
15 in Rice was to the classifications here.

16 MR. MCGILL: So I -- I understand the  
17 question, Your Honor. Rice, this -- this was,  
18 you know, the -- at the core of the Rice  
19 decision.

20 Rice starts by assuming what it calls  
21 your premises not established in our case law,  
22 both that native Hawaiians should be treated as  
23 an Indian tribe and, further, that Congress  
24 delegated to the State of Hawaii the power to  
25 regulate them.

1           That -- that -- the Court assumed  
2           that, assumed that they are an Indian tribe,  
3           that Hawaii had the power to regulate, and then  
4           it held that the tribe -- that Hawaii or  
5           Congress could not regulate a tribe in this way  
6           because it was regulating the affair of a state,  
7           not the tribe's own self-government.

8           And I think, you know, the point I --  
9           further point I would make about Rice is that  
10          Rice -- the -- the statute there had a much  
11          closer tie to self-government. It was the  
12          Office of Hawaiian Affairs. It had a much  
13          closer tie to self-government than the Indian  
14          Child Welfare Act.

15          JUSTICE KAGAN: Well, the first thing  
16          you need for self-government is, you know, a --  
17          a functioning polity. And Congress is very  
18          clear in this statute that it thinks that this  
19          statute is critical to the continuing existence  
20          of the tribe as a political entity.

21          And that's, in fact, one of the  
22          reasons it passes this statute, is the political  
23          entity is itself being threatened because of the  
24          way decisions on the placement of children are  
25          being made.

1           So I -- I guess I can't imagine a -- a  
2 -- a statute that's more wrapped up, given --  
3 given the terms and given what we know about  
4 what Congress was doing, is more wrapped up in  
5 the continued flourishing of political  
6 communities.

7           MR. MCGILL: Your Honor, the placement  
8 preferences do not affect tribal membership.  
9 You can be a member of the tribe wherever you  
10 are placed. And it is, you know, the fact that  
11 tribes often do unilaterally enroll children  
12 regardless of where they are placed.

13           The further point I would make, Your  
14 Honor, is that embedded in -- in the -- the  
15 question is -- is a premise that tribes have a  
16 proprietary interest in these children. And I  
17 have to reject that premise. Tribes --

18           JUSTICE KAGAN: Well, this is  
19 Congress's understanding of what it was doing,  
20 you know, and, again, this goes back to Justice  
21 Gorsuch's view of you can question the policy,  
22 you cannot question the policy, but the policy  
23 is for Congress's to make.

24           And Congress understood these  
25 children's placement decisions as integral to



1 the continued thriving of Indian communities.

2 And Congress had a different view of  
3 the costs and benefits of how these decisions  
4 were being made. And that's not something that  
5 we can second-guess, is it?

6 MR. MCGILL: It is under the  
7 Constitution, Your Honor. I -- the -- the --  
8 the -- the Congress does not have the power to  
9 treat these children as property of the tribes  
10 --

11 JUSTICE KAGAN: We -- we can second --

12 MR. MCGILL: -- because of their  
13 ancestry.

14 JUSTICE KAGAN: -- we can second-guess  
15 things under the Constitution if you have made a  
16 case about an equal protection violation or some  
17 other constitutional violation.

18 MR. MCGILL: Correct.

19 JUSTICE KAGAN: But what I'm  
20 suggesting is that just the idea of standing up  
21 there and saying this has nothing to do with the  
22 continued thriving of Indian political  
23 communities, that's a judgment for Congress to  
24 make.

25 MR. MCGILL: There -- I want to be

1 clear about this. There was a real problem that  
2 -- that Congress was trying to address. We're  
3 not denying that there -- the existence of a  
4 problem. But the means Congress chose are  
5 impermissible. Two wrongs do not make a right  
6 here.

7 JUSTICE KAGAN: Thank you, Mr. McGill.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Gorsuch?

10 JUSTICE GORSUCH: Counsel, let's put  
11 aside your equal protection complaints, which is  
12 what I understand the heart of your response to  
13 Justice Kagan.

14 On the Article I argument, you argued  
15 this whole area is outside Congress's control.  
16 All right? At least that's how I understood it  
17 going in.

18 But I'm now wondering -- I am confused  
19 by your argument. Do you acknowledge that  
20 Congress has some off-reservation or off-tribal  
21 land power --

22 MR. MCGILL: Congress can regulate --

23 JUSTICE GORSUCH: -- under Article I?

24 MR. MCGILL: Sorry to interrupt.

25 JUSTICE GORSUCH: Uh-huh.

1           MR. MCGILL: Congress may, under the  
2 Indian commerce power, regulate commerce with  
3 Indian tribes wherever it occurs.

4           JUSTICE GORSUCH: So -- so you agree,  
5 for example, with our precedent going back to  
6 1865 that says, in reference to any Indian tribe  
7 or any person who is a member of such tribe, is  
8 absolute without reference to the locality of  
9 the tribe or the member of the tribe with whom  
10 it's carried on? You agree with that?

11           MR. MCGILL: I'm not exactly sure  
12 which case you're referring to, but I agree with  
13 the --

14           JUSTICE GORSUCH: Holliday. Holliday.

15           MR. MCGILL: -- I think the -- pardon?

16           JUSTICE GORSUCH: Holliday.

17           MR. MCGILL: Right, there's equal  
18 protection problems there, but yes, yes.

19           JUSTICE GORSUCH: I'm asking you to  
20 put that aside. So -- so Congress can regulate  
21 off-reservation?

22           MR. MCGILL: It can regulate commerce  
23 with -- with Indians off-reservation, yes.

24           JUSTICE GORSUCH: Okay. And would you  
25 have us -- if your view of commerce is that

1 narrow, as -- as -- as portrayed in your brief,  
2 what happens to Congress's power to regulate  
3 healthcare for Indians off-reservation? That's  
4 a major part of Title 25. Would that go?

5 MR. MCGILL: I -- I -- I don't think  
6 our -- our view of commerce is any more limited  
7 than the Court described in Lopez. So I -- I  
8 would --

9 JUSTICE GORSUCH: So that might go?

10 MR. MCGILL: No, I don't believe so.  
11 I --

12 JUSTICE GORSUCH: That would stand?  
13 They could regulate healthcare for Indians off  
14 reservation? Yes or no?

15 MR. MCGILL: I think, to the extent  
16 that it is a -- you're regulating articles of  
17 commerce, it comes within the -- the heartland  
18 of --

19 JUSTICE GORSUCH: Healthcare counts?

20 MR. MCGILL: It counts -- it comes  
21 within the heartland of how Lopez defined  
22 commerce as I understand it.

23 JUSTICE GORSUCH: Healthcare counts,  
24 but this doesn't?

25 MR. MCGILL: This is treating children

1 as property.

2 JUSTICE GORSUCH: Forget about the  
3 equal protection argument for a moment.

4 MR. MCGILL: No, but it -- it goes to  
5 the commerce.

6 JUSTICE GORSUCH: Counsel, if I -- so  
7 commerce includes healthcare but not education,  
8 is that -- and -- and -- and -- and -- and child  
9 rearing, is that -- is that your view?

10 MR. MCGILL: No. It's -- you inserted  
11 education. But our position is that the  
12 commerce power does not extend to child  
13 placement decisions.

14 JUSTICE GORSUCH: So -- okay. So  
15 let's talk about that. If we've put aside the  
16 off-reservation, so this really has to do with  
17 something about family law, I -- I -- I take it,  
18 the core of your complaint then?

19 MR. MCGILL: This -- this is a family  
20 law case, Your Honor.

21 JUSTICE GORSUCH: And that's the core  
22 of the problem in your view, that Congress can't  
23 regulate family law matters for Indians  
24 off-reservation?

25 MR. MCGILL: I think that the core of

1 the problem is, if this is within Congress's  
2 authority, then there is nothing that cannot be  
3 regulated by Congress if it touches upon  
4 Indians.

5 JUSTICE GORSUCH: How about the fact  
6 that the federal government does lots of other  
7 family law mediation between sovereigns, the  
8 Parent Kidnapping Act, for example, domestically  
9 with respect to disputes among states, Congress  
10 speaks there.

11 And, as Justice Sotomayor mentioned,  
12 when there's a dispute between sovereigns,  
13 foreign sovereigns, it speaks there and we don't  
14 question its authority to do so.

15 Wouldn't it be a little odd to think  
16 that it couldn't do the same here?

17 MR. MCGILL: With respect to the  
18 latter point, Congress, of course, has power to  
19 enact laws to implement treaties, and so I -- I  
20 think the Hague Convention-type legislation is  
21 unremarkable. I think Congress acts in this --

22 JUSTICE GORSUCH: How about the parent  
23 kidnapping statute?

24 MR. MCGILL: I'm -- I will confess to  
25 not being familiar with that one. But, if you

1 look at perhaps the --

2 JUSTICE GORSUCH: All right. Well,  
3 we'll -- we'll put that aside then if you're not  
4 familiar with it. You're saying it would be  
5 possible to do it under the treaty power.

6 What if Congress tomorrow adopted a  
7 treaty with the tribes that replicated ICWA?  
8 Would that be within its power?

9 MR. MCGILL: It would perhaps -- I --  
10 I think it perhaps would be within its Article I  
11 power.

12 JUSTICE GORSUCH: That's my question,  
13 yeah, it would be. Okay. And how about if it  
14 did it under the Spending Clause? That -- could  
15 that be within its Article I power?

16 MR. MCGILL: Well, that's how Congress  
17 regulates the states in the Multi-Ethnic  
18 Placement Act, and --

19 JUSTICE GORSUCH: So it could do these  
20 things under Article I. You're just complaining  
21 that it's done -- being done under the Indian  
22 Commerce Clause?

23 MR. MCGILL: I think that that is our  
24 argument. We're not saying that Congress is  
25 powerless in this area. Congress has power,

1 certainly, through the -- the Spending Clause to  
2 do any number of things with respect to states,  
3 how states govern themselves.

4 JUSTICE GORSUCH: When it comes to  
5 placement of children, is it a little  
6 anachronistic to think that states have some  
7 particular sovereign interest here when many of  
8 them did not involve themselves at all in  
9 placement matters directly until the 1960s? It  
10 was mostly done privately for most of the  
11 nation's history.

12 MR. MCGILL: I don't know that I would  
13 describe it as anachronistic, but I think the  
14 fact that things were done privately does not  
15 change what this Court has said about the  
16 state's primary role in the area of child  
17 custody matters.

18 JUSTICE GORSUCH: How about the fact  
19 that the federal government has been  
20 historically involved in family law matters with  
21 respect to native Americans for a long time? As  
22 Justice Kagan pointed out, it passed this  
23 statute in -- in -- in kind of -- to remedy its  
24 prior actions in this area with respect to  
25 boarding schools and the displacement of Native



1 American children. So could it -- could it have  
2 done the boarding schools, or is -- you're  
3 arguing that that would have been improper too?

4 MR. MCGILL: I -- I think the boarding  
5 schools statute requiring the -- or permitting  
6 the forcible enrollment of Indian children in  
7 boarding schools without the consent of their  
8 parents is obviously unconstitutional.

9 JUSTICE GORSUCH: Under Article I?

10 MR. MCGILL: Yes, because it has  
11 nothing to do with commerce in my -- would be my  
12 submission.

13 JUSTICE GORSUCH: Okay. And then back  
14 to Justice Kagan's questions, if commerce does  
15 include things essential to Indian  
16 self-governance, and I think you've conceded  
17 that, tribal lands, tribal governmental  
18 arrangements, I guess I'm struggling to  
19 understand why -- why this falls on the other  
20 side of the line when Congress makes the  
21 judgment that this is essential to Indian self-  
22 -- preservation of -- of Indian tribes.

23 MR. MCGILL: The -- the power that has  
24 been recognized is the power to effectuate  
25 Indian self-government, which is the power of

1 tribes to make their own laws and be ruled by  
2 them.

3 And ICWA does not affect tribes'  
4 ability to make their own laws. It doesn't  
5 affect their ability to be ruled by them, except  
6 with respect to Section 1911(a), which provides  
7 for exclusive jurisdiction of children -- you  
8 know, pertaining to children who are resident on  
9 tribal lands.

10 JUSTICE GORSUCH: Lastly, is there  
11 some irony to your position that you're here to  
12 vindicate states' rights? We have 23 states  
13 who've lined up on the other side. We've never  
14 had a state court, near as I can tell, in the 40  
15 some years since ICWA was adopted complaining  
16 about this arrangement.

17 MR. MCGILL: I don't understand that  
18 to be correct, Your Honor. I think there are  
19 state courts that have recognized that ICWA has  
20 -- it far exceeds Congress's --

21 JUSTICE GORSUCH: Has any -- have  
22 state courts held that this is unconstitutional?

23 MR. MCGILL: There's the case -- the  
24 cases that held that it -- under what was known  
25 as the existing Indian family doctrine, that

1 said that it would be unconstitutional as  
2 applied to a child who had no connection --

3 JUSTICE GORSUCH: Right.

4 MR. MCGILL: -- to a tribe.

5 JUSTICE GORSUCH: Fair. But I'm not  
6 aware of anybody holding ICWA facially  
7 unconstitutional in the manner that you're  
8 asking us to do.

9 MR. MCGILL: No, I -- I -- I would  
10 concede that no state court has -- has --

11 JUSTICE GORSUCH: Gone anywhere --

12 MR. MCGILL: -- done that.

13 JUSTICE GORSUCH: Yeah. Okay. Thank  
14 you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Kavanaugh?

17 JUSTICE KAVANAUGH: Earlier, in  
18 response to Justice Jackson's question about the  
19 legislative history, you said you had four  
20 responses. You got out one and two about the  
21 Cherokee, Seminole, and then the placement does  
22 not equal membership. I was interested in what  
23 three and four are, if you remember the  
24 question.

25 MR. MCGILL: I think I do, Justice

1 Kavanaugh.

2           The third point is that the -- that  
3 the placement -- to the extent we're talking  
4 about tribal self-government, which is to say  
5 the ability of tribes to make their own laws,  
6 the ability under Williams, reservation Indians,  
7 to make their own laws and be ruled by them, the  
8 placement preferences do not even suggest that  
9 any Indian child has to live on or near a  
10 reservation.

11           And the fourth point, which is the  
12 most fundamental point, which is that embedded  
13 in this argument is that tribes have a  
14 proprietary interest in these -- in these  
15 children. And they are human beings. They are  
16 citizens of the United States and the states in  
17 which they reside. They are persons within the  
18 meaning of the Fifth Amendment. And they have  
19 liberty interests that the tribe cannot override  
20 simply by unilaterally enrolling them.

21           JUSTICE KAVANAUGH: On the equal  
22 protection issue, it'll be important for us to  
23 figure out the scope and limits of Mancari. And  
24 I'm going to ask two hypotheticals and then ask  
25 you to explain what I think will be your answer.

1           So, one, would Mancari justify a  
2 hiring preference for American Indians in other  
3 agencies beyond the BIA, such as the Treasury  
4 Department or the Justice Department, for  
5 example, in your view?

6           MR. MCGILL: No, because, one, Mancari  
7 itself casts doubt on that possibility. And,  
8 two, there would be no tether to Indian  
9 self-government.

10          JUSTICE KAVANAUGH: Second, would  
11 Mancari alone justify a federally mandated  
12 preference for state universities, college  
13 admissions for American Indians, in your view?

14          MR. MCGILL: No, Your Honor.

15          JUSTICE KAVANAUGH: And why not?

16          MR. MCGILL: Again, because it would  
17 have no tether to Indian self-government. I  
18 think part of the flaw of the -- you know, the  
19 arguments on the other side here is that it --  
20 it reduces to anything that is good for Indians,  
21 that could be characterized in that way or that  
22 the government in its paternalistic judgment  
23 thinks might be good for Indians can be -- is  
24 permissible under their view.

25          JUSTICE KAVANAUGH: Well, wouldn't

1 that be good for Indian self-government in the  
2 sense of ensuring additional, better education  
3 for American Indians? Why wouldn't that  
4 justification link up with tribal  
5 self-government?

6 MR. MCGILL: It's too attenuated, Your  
7 Honor, and Rice, I think, explains this. Rice  
8 draws this line between regulation of the  
9 tribes' internal affairs and the use of tribal  
10 classifications there and the use of tribal  
11 classifications in the affairs of the state.

12 In your hypothetical, we're talking  
13 about the affairs of the state. And I think  
14 that, you know, the important point about Rice  
15 is that there -- there -- in that case, there  
16 was a -- not just a plausible, a fairly direct  
17 tie to self-government of the indigenous people.

18 But the Court said Mancari could not  
19 be extended to that new context because Mancari  
20 was a limited exception based on the "sui  
21 generis" role of the BIA in regulating Indian  
22 tribes. And that's just simply not present in  
23 your hypothetical.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice --

1 Justice Barrett?

2 JUSTICE BARRETT: Mr. McGill, I'd like  
3 to ask you about the commandeering argument. So  
4 I want to focus just on the active efforts  
5 provision for right now. I want to get a grip  
6 on how this works, you know.

7 So that provision requires the parties  
8 seeking to effect a foster care placement or  
9 termination of parental rights to satisfy the  
10 court that active efforts have been made to  
11 provide remedial services and rehabilitation  
12 programs designed to prevent the breakup of the  
13 Indian family.

14 And the government says, well, this  
15 applies to both private parties and state  
16 agencies. And so it's not directed at the state  
17 agencies in compelling government action, in  
18 compelling the state to take steps.

19 How does this work? Do private  
20 agencies in the Brackeens' case -- I mean, do  
21 private agencies initiate these proceedings, or,  
22 really, is this something that falls on the  
23 states?

24 MR. MCGILL: I think, on the ground,  
25 it falls on -- on the states in the overwhelming

1 majority of -- of -- of cases. I mean, I can't  
2 speak to the -- to the whole of the United  
3 States and -- but my understanding is, in the  
4 overwhelming majority of cases, it falls on the  
5 states to do this. And that is the -- you know,  
6 of course, they are the ones that have the  
7 ability to do so.

8 JUSTICE BARRETT: Okay. Thanks.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Jackson?

11 JUSTICE JACKSON: Yes. So I think  
12 there's an aspect of your Article I argument  
13 that really boils down to a fundamental question  
14 that comes up in the law a lot, which is who  
15 decides. Who decides whether regulation in this  
16 area counts for Indian self-government, promotes  
17 Indian self-government, has a sufficient tether?

18 I keep hearing you say in response to  
19 many of my colleagues' questions that you think  
20 that regulation related to family affairs does  
21 not have a sufficient connection to Indian  
22 self-government. But, in the actual legislative  
23 history of this -- of ICWA, and I'm reading from  
24 the Federal Register, Congress says -- it  
25 indicates that ICWA reflects its "concern about



1 preserving the integrity of tribes as  
2 self-governing sovereign entities and ensuring  
3 that tribes could survive both culturally and  
4 politically." That's 81 Fed. Reg. -- Federal  
5 Register 38,781.

6 So it seems to me that Congress has  
7 made a decision that regulating in this area is  
8 important for preserving the integrity of tribes  
9 as self-governing sovereign entities. And,  
10 therefore, I don't think it's sufficient for you  
11 to say to us that you think that that's not  
12 true.

13 So tell me how we're supposed to  
14 decide based on your view of whether or not this  
15 is a sufficient tether, as opposed to what  
16 Congress has said about it.

17 MR. MCGILL: I would -- first, I -- I  
18 guess I have two responses to that, Justice  
19 Jackson.

20 First is I would look to this Court's  
21 cases that define the interest in  
22 self-government, and I would start with Williams  
23 versus Lee, which defines it as the right or the  
24 ability of reservation Indians to make their own  
25 laws and be ruled by them.

1           That -- that case has never been, you  
2 know, to my knowledge, limited or abrogated.  
3 And that is my understanding of how this Court  
4 defines the interest in self-government.

5           JUSTICE JACKSON: But why would that  
6 be our decision then? I'm still worried that  
7 that would be this Court displacing Congress's  
8 policy judgment around what counts.

9           MR. MCGILL: Because the text of the  
10 statute and its -- you know, and its operative  
11 effect does not advance the objective there.  
12 The -- if the objective is preserving the  
13 existence of tribes, the third placement  
14 preference does nothing to effectuate that.

15           JUSTICE JACKSON: All right. Let me  
16 ask you another question. You have seemed to be  
17 very upset about Congress's exercise of plenary  
18 authority over Indian affairs. You say we need  
19 to look at it in a more narrow lens, I guess  
20 consistent with the sort of general  
21 understanding that Congress has limited  
22 authority.

23           What I'm a little bit confused about  
24 and concerned about is whether it's really  
25 correct that we have to look at it so narrowly,

1 that is, the scope of Congress's authority as it  
2 concerns Indian affairs, when we have said over  
3 and over again that Congress has plenary and  
4 exclusive authority, and when the history of our  
5 Constitution indicates that the constitutional  
6 design was about ensuring, in a way, that the  
7 federal government had the authority over the  
8 tribal relations, tribal affairs, and not the  
9 states.

10           It seemed to me that baked into the  
11 Constitution's structure related to this,  
12 outside of just the Indian Commerce Clause  
13 provision, is the notion that the federal  
14 government, you know, vis-à-vis the states was  
15 going to be taking charge of this, especially in  
16 light of the Articles of Confederation  
17 precedent.

18           So, if that's the case, then what --  
19 what would you say about the thought that rather  
20 than, you know, searching for, you know, what  
21 additional limits there are on Congress's  
22 authority, we start with the premise that, with  
23 respect to Indian affairs, Congress has plenary  
24 authority and, therefore, as we've said in all  
25 of these prior cases, as long as it involves

1 Indian affairs and Congress is making policy  
2 judgments, they have a constitutional basis for  
3 doing so?

4 MR. MCGILL: Justice Jackson, if -- if  
5 the -- if this arises from the constitutional  
6 structure, as you suggested, then it has to be  
7 the United States Govern -- the -- the United  
8 States Government's regulation of tribes on a  
9 government-to-government basis. That's the  
10 constitutional structure point.

11 And if we're talking about regulating  
12 tribes as government -- governments, we are  
13 talking about regulating their residual  
14 sovereign interests, which are, as I described,  
15 in Indian lands, they're treaty rights.

16 JUSTICE JACKSON: Yeah, but do you  
17 dispute that there's a trust relationship? My  
18 understanding was that, yes, we're talking  
19 sovereign to sovereign but that as a part of  
20 that was the understanding that the United  
21 States was the greater sovereign, that it was  
22 taking over the Indian sovereignty and,  
23 therefore, had a trust relationship that arose  
24 in that context and they were responsible for  
25 Indian affairs as a result.

1 Do you dispute that?

2 MR. MCGILL: We don't -- of course, we  
3 do not dispute the existence of the trust  
4 relationship. All we're saying is that the  
5 power that Congress exercises that has been  
6 described as plenary is limited in some way by  
7 the -- by the sovereign interests that --

8 JUSTICE JACKSON: So you're saying  
9 that Congress -- Congress can carry out and  
10 effectuate its trust relationship but only in  
11 the limited ways that you are now articulating?

12 MR. MCGILL: No, Your Honor. I think  
13 what we're saying is that there -- you don't  
14 have to do anything with respect to Congress --  
15 the federal government's trust relationship with  
16 Indian tribes to recognize that that power does  
17 not extend to regulating the placement of Indian  
18 children in state courts.

19 JUSTICE JACKSON: Even if Congress has  
20 decided that -- that regulation in that area is  
21 necessary to prevent the extinction of tribes,  
22 they can't do it, you're saying, pursuant to the  
23 trust relationship that you seem to concede  
24 exists?

25 MR. MCGILL: Your Honor, we do not

1 concede that -- that, for the reasons that I  
2 elaborated, that this is not a -- the -- the  
3 tribes do not have a proprietary interest in  
4 these children. They are also -- take a -- take  
5 YRJ. She is --

6 JUSTICE JACKSON: Can I just -- I'm  
7 sorry, can I just ask one more question? My  
8 time is short.

9 With respect to commandeering, where  
10 Justice Barrett took you, do you have a case  
11 that is older than the early 1990s related to  
12 the commandeering principle? Is that the first  
13 time -- I tried to look back to figure out where  
14 anti-commandeering came from as a constitutional  
15 concept.

16 And I'll tell you why I'm concerned  
17 about it, because I think it's relatively recent  
18 and I'm just trying to understand whether it  
19 even conceivably applies to an area in which we  
20 have already or long recognized that the federal  
21 government has this sort of plenary authority  
22 because states were interfering with Indian  
23 affairs.

24 And so it seems to me odd that we  
25 would suddenly say in this area using a

1 relatively new anti-commandeering principle that  
2 the federal government can't do what it has long  
3 done in terms of taking control of this area  
4 away from the states related to Indian affairs.

5 MR. MCGILL: Your -- Your Honor, the  
6 Court's anti-commandeering cases recognize that  
7 the doctrine arises from the structure of the  
8 Constitution and the Tenth Amendment. That was  
9 obviously recognized fully by New York versus  
10 United States. But, as I recall --

11 JUSTICE JACKSON: In 1992?

12 MR. MCGILL: But, as I recall, there  
13 -- there was a case called Coil that I think is  
14 from the 1920s, maybe 1925, that involved the  
15 federal government's dictating where Oklahoma  
16 put its state capital. And I think that was the  
17 earliest case I found that actually applied some  
18 version of the anti-commandeering law.

19 JUSTICE JACKSON: But we don't have  
20 any anti-commandeering cases that -- that arise  
21 in the Indian affairs context? This would be  
22 the first time?

23 MR. MCGILL: I'm not aware of any,  
24 Your Honor.

25 JUSTICE JACKSON: Thank you.

1 MR. MCGILL: I --

2 CHIEF JUSTICE ROBERTS: Do you have a  
3 further --

4 MR. MCGILL: I -- I -- I would, just  
5 except to the extent that Oklahoma, of course,  
6 arose from once upon a time being Indian  
7 territory.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 General Stone.

11 ORAL ARGUMENT OF JUDD E. STONE, II,  
12 ON BEHALF OF TEXAS

13 MR. STONE: Thank you, Mr. Chief  
14 Justice, and may it please the Court:

15 Congress cannot require states to  
16 administer a nationwide child custody regime.  
17 As far as the state is aware, this Court has  
18 upheld only three kinds of laws even under a  
19 plenary congressional power over Indian tribes:  
20 first, those regulating trade or implementing  
21 treaties with tribes in the ordinary original  
22 understanding of those clauses; second, those  
23 applying to Indians within U.S. territories or  
24 on Indian lands; and, third, those regulating  
25 tribal governments as such.



1           ICWA far exceeds this plenary power,  
2     applying only to child custody proceedings in  
3     state courts off reservations.

4           Even if Congress could establish such  
5     a scheme, however, it cannot order states to  
6     enforce it. ICWA issues a dozen commands to  
7     states or their officials. Each obscures  
8     federal accountability for ICWA and each foists  
9     uncompensated costs on to states. Each is,  
10    therefore, prohibited under Murphy.

11           And I welcome the Court's questions.

12           JUSTICE THOMAS: I mean, General  
13     Stone, it would profit us that if you would  
14     address your standing in this case, particularly  
15     since it seems that, to the extent that you're  
16     representing parents or potential parents, they  
17     can represent themselves, and I think it would  
18     be good to get an explanation of your standing.

19           MR. STONE: Certainly, Your Honor.  
20     First and foremost, consistent with West  
21     Virginia versus EPA from last term, Texas is, in  
22     fact, the regulated party, the party obligated  
23     to implement ICWA from beginning to end.

24           As this Court put it in West Virginia,  
25     the fact that West Virginia and similar states

1 were the ones who were required to cut emissions  
2 and otherwise alter their energy distribution,  
3 that was enough to leave "little doubt" as to  
4 their standing for the entirety of the clean  
5 power plan.

6           Second, Texas is -- Texas stands to  
7 lose substantial amounts of Medicare -- or,  
8 rather, Social Security Part IV-B and Part IV-E  
9 money. In 2018, Texas received \$410 million  
10 underneath those parts. Those parts are  
11 expressly conditioned on Texas taking  
12 affirmative steps to comply with ICWA. And the  
13 regulations implementing those sections, 45  
14 C.F.R. 1355.34 and 36, make clear in mandatory  
15 language that if Texas does not, in fact, do so,  
16 if any state does not do so, in mandatory  
17 language, the -- the relevant administrative  
18 entity shall withhold through a complex formula  
19 up to 42 percent of that -- of that \$410 million  
20 for Texas. That comes out to about \$172 million  
21 for an agency with a \$2.4 billion budget. So a  
22 very significant amount.

23           And then, finally, speaking as to  
24 their specific equal protection injury, aside  
25 from the fact that it costs us money to

1 implement the equal protection violating  
2 provisions, for example, we have to determine  
3 whether or not an individual is an Indian child  
4 pursuant to the regulations and the statute.

5           Aside from that, there's a unique  
6 conjunction of constitutional obligations here  
7 that because this Court has held in Adarand that  
8 the federal equal protection component of the  
9 Fifth Amendment and the Fourteenth Amendment's  
10 Equal Protection Clause essentially have the  
11 same commands, any command by the federal  
12 government that violates the Fifth Amendment,  
13 that imposes a mandatory requirement on states  
14 to essentially carry out that equal protection  
15 violative component, requires the states to  
16 violate equal protection.

17           And that is a unique constitutional  
18 injury that Texas as a state, as an actor,  
19 suffers.

20           JUSTICE SOTOMAYOR: This is quite a  
21 theory you have. Every time that a state has to  
22 interpret a federal law that might be  
23 unconstitutional, the state has standing even if  
24 that law hurts somebody else. That's what  
25 you're basically saying, because we would be

1 complicit in the act of violating someone else's  
2 rights. That's how I hear your argument.

3 MR. STONE: Certainly not, Your Honor.  
4 It actually is much narrower than that. So take  
5 a --

6 JUSTICE SOTOMAYOR: How narrower? You  
7 don't have -- and Justice Thomas pointed out the  
8 Fifth Amendment in our cases are legion. You  
9 can't represent individuals who have equal  
10 protection claims. The parents are here before  
11 us. They can defend their own claims.

12 I can understand your  
13 anti-commandeering, your anti-delegation claims.  
14 Potentially, that has to do with your expenses.  
15 But those other equal protection violations of  
16 being treated unequally belong to the parents,  
17 not to Texas.

18 MR. STONE: Two components, Your  
19 Honor. First of all, Texas suffers a classic  
20 pocketbook injury when it has to actually  
21 implement --

22 JUSTICE SOTOMAYOR: So you're saying  
23 exactly what I started with. You're taking the  
24 extraordinary position that anytime you have to  
25 enforce an unconstitutional law you're complicit

1 and you have standing?

2 MR. STONE: No, Your Honor. No. It  
3 -- it results from a conjunction of a few  
4 extremely unusual components of these commands.  
5 One is -- and we can discuss this as part of our  
6 -- the anti-commandeering section. We do not  
7 view these commands as permissible preemption  
8 under NCAA versus Murphy but as commands to the  
9 states. Those commands from the federal  
10 government --

11 JUSTICE SOTOMAYOR: That's  
12 anti-commandeering. So that's one factor.  
13 What's second?

14 MR. STONE: The commands from the  
15 federal government themselves violate the Fifth  
16 Amendment's equal protection component. That  
17 equal protection obligation --

18 JUSTICE SOTOMAYOR: As it applies to  
19 the individuals?

20 MR. STONE: Yes.

21 JUSTICE SOTOMAYOR: Okay.

22 MR. STONE: That's correct.

23 JUSTICE SOTOMAYOR: And we're back to  
24 what I said before. Now what's your third?

25 MR. STONE: Your Honor, because --

1 because that Fifth Amendment equal protection  
2 violation is coterminous with Texas's equal  
3 protection requirements, if Texas implements the  
4 Fifth Amendment violation, it itself violates  
5 the Fourteenth Amendment because they are, in  
6 fact, coterminous.

7 JUSTICE SOTOMAYOR: We're back --  
8 we're back to my first point.

9 JUSTICE BARRETT: General Stone, can I  
10 ask you about the anti-commandeering point?  
11 Because I'm trying to figure out how this works.  
12 So the question that I asked Mr. McGill, is  
13 this, the active efforts provision, one that  
14 imposes an obligation on the states alone, or is  
15 it something that could also fall on private  
16 agencies or private parties?

17 MR. STONE: Well, the final rules  
18 preamble helps solve this question as  
19 specifically to -- to the active efforts  
20 provision, where the final rule states that the  
21 active efforts provision in ICWA was intended to  
22 make states provide substantive services to  
23 Indian families. It comes out in -- in express  
24 language to make states, in fact, incur that  
25 cost to provide social services.

1           That's the heart of what Murphy was  
2 cautioning about, is that specifically a command  
3 best understood as requiring a state to do a  
4 thing, especially when it either hides political  
5 accountability or foists uncompensated costs on  
6 the states, is in the heartland of the  
7 anti-commandeering doctrine. This, under that  
8 second branch, is an easy case for purposes --  
9 for purposes specifically of active efforts.

10           We have other provisions we're  
11 challenging with other bases I'd be happy to  
12 discuss if you're curious, Your Honor.

13           JUSTICE BARRETT: Well, recordkeeping  
14 seems to go a bit farther than some of our other  
15 cases. We reserved that in Printz.

16           MR. STONE: This Court reserved it in  
17 Printz with some very specific caveats, I agree,  
18 Your Honor. Specifically, the Court said it  
19 might, in fact, be permissible, given that --  
20 and as Justice Scalia noted, it was unclear in  
21 that case -- given that those courts regarding  
22 the naturalization oaths may well have  
23 volunteered essentially to that jurisdiction.

24           And then it becomes a case of, if the  
25 courts are willingly serving for purposes of

1 doing this federal thing, that then it's a much  
2 smaller intrusion, commandeering or not, for  
3 them to have an ancillary paperwork burden.

4 Of course, states aren't volunteering  
5 for ICWA in the first place. And I think the  
6 thinness of the historical evidence specifically  
7 on this point comes from the seven laws that  
8 Respondents cite. Of those, two of them are  
9 patently unconstitutional on other grounds. One  
10 is one of the Alien and Sedition Acts. Another  
11 is essentially a law that required a court make  
12 a determination on pension eligibility that was  
13 reviewable by an executive branch. So those  
14 tell us nothing about the Constitution because  
15 they're riven with a plain constitutional  
16 violation.

17 Two more essentially have nothing to  
18 do with states at all, or one more has nothing  
19 to do with states at all, which is the  
20 Homesteading Act of 1862. Does not mention  
21 state courts or state governments in any way.  
22 Cannot possibly tell us anything about  
23 anti-commandeering.

24 Two more past that make it permissible  
25 but not mandatory for states to accept bail



1 regarding certain federal fugitives or federal  
2 prisoners. And the only two left are the same  
3 two that are mentioned in Printz regarding  
4 recordkeeping for naturalizations, which this  
5 Court looked at as essentially not enough to  
6 determine the question even there.

7 So the laws they give as historical  
8 evidence are far from something to demonstrate  
9 even what Printz showed, let alone enough  
10 generalized no courts component.

11 JUSTICE JACKSON: But, Mr. Stone --

12 JUSTICE GORSUCH: Counsel, before you  
13 --

14 JUSTICE JACKSON: -- that assumes that  
15 anti-commandeering applies in this entire area.  
16 And can you speak to my concern about that? I  
17 understood from New York versus United States  
18 that anti-commandeering rests on the premise  
19 that Congress has the power to regulate  
20 individuals and not states, which may well be  
21 true as a general matter, but, in terms of  
22 Indian affairs, we have long interpreted the  
23 Constitution to give Congress plenary authority  
24 precisely because the Constitution seems to be  
25 structured to give Congress, the federal

1 government, power at the expense of the states  
2 with respect to Indian affairs.

3           It's sort of like the -- the -- the --  
4 the background principle of all of this was that  
5 states were getting involved in Indian affairs,  
6 and the Constitution says no, Congress can -- is  
7 the one that gets to direct it.

8           I don't understand why wrapped up in  
9 that authority isn't Congress's authority to --  
10 to direct the states to stay out of the way or  
11 to do whatever it is that's necessary to ensure  
12 that, you know, Indian affairs, Indian  
13 sovereignty is protected?

14           MR. STONE: Two answers, Your Honor.

15           JUSTICE JACKSON: Yes.

16           MR. STONE: One coming from this  
17 Court's case law and then one from the original  
18 materials. One -- and this is the nearest  
19 analogue of which I'm aware -- of course, this  
20 Court was brought an argument that under the  
21 Indian Commerce Clause was a sufficiently  
22 plenary power to breach state sovereign  
23 immunity. That's Seminole Tribe, and this Court  
24 rejected that, and not only rejected that  
25 argument, it overturned Union Gas in the

1 process.

2 So this Court has recognized -- it  
3 actually made this explicit in Delaware versus  
4 Weeks -- there may be a plenary power, but it is  
5 not absolute. And the -- the lack of that  
6 absolute component has been used -- has been  
7 sort of applied for specifically preserving the  
8 sovereign prerogatives of the states before.

9 JUSTICE GORSUCH: Counsel --

10 MR. STONE: That's the --

11 JUSTICE GORSUCH: -- if I might  
12 interrupt, I'm sorry, but just -- I want to  
13 understand your commandeering argument. It  
14 seems like it's centrally related to two rather  
15 modest aspects of ICWA. One is the  
16 recordkeeping requirement, which you discussed  
17 with Justice Barrett, is that right?

18 MR. STONE: That is one of them, yes.

19 JUSTICE GORSUCH: And the other major  
20 one that you -- you cite is -- is -- is the  
21 active efforts provision.

22 MR. STONE: There are others we also  
23 challenged. Those are two of the most major, we  
24 agree.

25 JUSTICE GORSUCH: Okay. And -- and --

1 those are the major ones. All right. And with  
2 respect to active efforts, I'm not sure I heard  
3 an answer to Justice Barrett's question, and her  
4 question was, does it apply equally to whomever  
5 is bringing the -- the action in state court,  
6 whether it's the state as it is sometimes or  
7 private parties as it is sometimes? That active  
8 efforts requirement, does it apply to both  
9 equally?

10 MR. STONE: To both, yes; equally, no.  
11 And so, to both, yes, it is under some  
12 circumstances that private parties have to make  
13 these efforts. Typically, that is the state,  
14 as, again, was acknowledged in the -- in the  
15 final rule.

16 JUSTICE GORSUCH: Typically because  
17 it's the party active -- starting the  
18 proceedings, right?

19 MR. STONE: Typically, yes, but also  
20 --

21 JUSTICE GORSUCH: But not -- not  
22 always?

23 MR. STONE: Not always, no, that's  
24 correct. But also, later in the active efforts  
25 provision, recall, again, in this -- in Murphy,

1 the Court said the -- the way that the Court  
2 looks at it is, is this better looked at as a  
3 regulation of the sovereign or instead as  
4 something regulating private.

5 JUSTICE GORSUCH: I got it.

6 MR. STONE: The active efforts  
7 provision specifically speaks to what a state  
8 court may do with its official power.

9 JUSTICE GORSUCH: Right.

10 JUSTICE ALITO: May I come back to the  
11 question whether the anti-commandeering doctrine  
12 applies at all when Congress is exercising its  
13 power over Indians?

14 Suppose Congress enacted a law  
15 ordering the states to enact legislation  
16 relating to Indians. Would that be a violation  
17 of the anti-commandeering doctrine?

18 MR. STONE: I think it would be about  
19 the most direct one conceivable, Justice Alito.

20 JUSTICE GORSUCH: Counsel, if we could  
21 turn to Article I, we've had many variations of  
22 this -- this argument. We've heard that it has  
23 to relate strictly to commerce. We've heard,  
24 no, later today we heard, no, it can be  
25 off-reservation. It can be family law

1 sometimes. It just can't be this combination  
2 here.

3 What is -- what exactly are you asking  
4 us to adopt here? What is beyond the Article I  
5 power?

6 MR. STONE: Certainly, Your Honor.  
7 So, to clear up a few things that you first  
8 mentioned, we are not claiming that there is a  
9 domestic relations exception generally. We're  
10 not saying that the powers that Congress enjoys  
11 must only be exercised on reservations or  
12 similarly.

13 JUSTICE GORSUCH: Okay. So -- so  
14 Congress can act off-reservation sometimes?

15 MR. STONE: Yes, Your Honor.

16 JUSTICE GORSUCH: Okay. And it can do  
17 domestic relations sometimes?

18 MR. STONE: Yes, Your Honor.

19 JUSTICE GORSUCH: Okay. So what --  
20 what's -- what's the magic broth that makes this  
21 somehow a problem having conceded both those  
22 points?

23 MR. STONE: Certainly, Your Honor.  
24 It's because of the three components of what  
25 this Court has recognized as plenary power.

1           The first, again, is, for example, the  
2           implementation of treaties or acts that would be  
3           ordinarily understood in commerce.

4           This Court has described, for example,  
5           Congress as having a plenary power when Congress  
6           has prohibited alcohol sales to tribes. Of  
7           course, forbidding the sale of alcohol or  
8           forbidding any other sale of good would just be  
9           an ordinary regulation of commerce.

10           JUSTICE GORSUCH: But you -- we  
11           disavowed that argument, that it's strictly  
12           related to commerce. So, again, what -- what is  
13           the rule you would have us write? I'm just --  
14           I'm just trying to figure out, how do I write  
15           the opinion?

16           MR. STONE: Certainly, Your Honor.  
17           There's three components to the plenary power.  
18           One are the ordinary applications of the various  
19           powers in the Constitution --

20           JUSTICE GORSUCH: Right.

21           MR. STONE: -- which encompass more  
22           than just --

23           JUSTICE GORSUCH: But this goes beyond  
24           that, so let's -- where is the limit?

25           MR. STONE: The limits come from

1 several of these Court's cases. One, this Court  
2 has emphasized that Congress has special power.  
3 This comes from *Tiger versus Western Investment*  
4 *Co.* and *Kagama* itself, that the -- the  
5 government has a power, specifically speaking,  
6 on regulating Indian members or, rather, Indian  
7 tribes on Indian lands themselves.

8 JUSTICE GORSUCH: But we've -- we've--  
9 we've said that's not the limit here either.  
10 So, again, counsel, you've said it doesn't have  
11 to be on reservation and it can be domestic  
12 relations. So what's -- how do you write this?

13 MR. STONE: Respectfully, Your Honor,  
14 Congress may act if it -- if it is in one of  
15 three essentially parcels of power.

16 One of them isn't related to geography  
17 at all, for example, the exercise of the treaty  
18 power, the exercise of -- of the commerce power.  
19 Of course, the exercise of the territory clause  
20 would be geographically related. But, in this  
21 first bucket, there is not a geographic  
22 component.

23 The second there is one, because, as  
24 this Court recognized, the power goes  
25 specifically to the soil and the people within



1 these limits speaking of Indian country.

2 The third is the power that Congress  
3 has essentially to act on Indian governments as  
4 governments. So, for example, extending or  
5 investing them with tribal immunity, extending  
6 or foreclosing their ability to prosecute crimes  
7 or for other sovereigns to prosecute crimes on  
8 their land.

9 If Congress is acting pursuant to one  
10 of those three components, then it falls  
11 comfortably either within the Congress's  
12 enumerated powers as originally understood or  
13 the plenary power, which we are not asking this  
14 Court even to contract, let alone to --

15 JUSTICE KAGAN: General, I'm -- I'm  
16 curious as to where you get those three  
17 categories?

18 MR. STONE: They're a normative  
19 description of what this Court has, in fact,  
20 done, or --

21 JUSTICE KAGAN: I mean, there's no  
22 place --

23 MR. STONE: -- a description, rather,  
24 of what this Court --

25 JUSTICE KAGAN: -- there's no place

1 where we've said these are the three categories  
2 that define what the plenary power means,  
3 correct?

4 MR. STONE: There are two places where  
5 Congress has specifically stated that there is a  
6 special power that track the second and third  
7 categories that I'm describing. One, for  
8 example, being for the third category regarding  
9 governance, being that the -- the tribal  
10 power -- the U.S. Government enjoys essentially  
11 a complete power that the -- that tribal  
12 immunity or tribal sovereignty exists at  
13 Congress's sufferance.

14 Of course, to say something exists at  
15 Congress's sufferance is to say they have  
16 something like an absolute power.

17 JUSTICE KAGAN: Yeah, I guess the only  
18 point I was making, I'm sure that we can find  
19 places where the Court has said that Congress  
20 has power over each of these areas, but I don't  
21 think you'll be able to find a place where the  
22 Court has said what the plenary power means is  
23 these three things and these three things alone  
24 and the plenary power doesn't extend further,  
25 because, after all, the Court has said -- I

1 mean, I -- I don't really believe in -- in  
2 reading our opinions like statutes.

3 But, when the Court uses the phrase  
4 "plenary power" tens and tens of times over  
5 decades and decades, I mean, plenary means  
6 unqualified. It means all-encompassing.

7 Now I don't doubt what you said  
8 earlier, that it might have an occasional  
9 exception here or there, but it strikes me as a  
10 very odd way to think about plenary power to  
11 just start, like, constructing categories and  
12 saying everything else is left out when we've  
13 said over and over everything, except really  
14 rare things, are in.

15 MR. STONE: Two points, Your Honor.  
16 First, we agree that we are describing a power  
17 that has already left Article I constitutional  
18 bounds. Our core exhortation is, because it is  
19 already beyond the original understanding of the  
20 powers Congress has, that this Court shouldn't  
21 extend it further.

22 This Court has not come out and said  
23 these are the three categories and there shall  
24 be no more.

25 JUSTICE SOTOMAYOR: Originally meaning

1 we have Justices Marshall and Story basically  
2 using very broad language saying plenary powers  
3 means all powers in every intercourse with  
4 Indians. And we have a series of laws that were  
5 not limited in the way that you talked about.  
6 And we've had series of laws for 200 years not  
7 limited.

8           You are excluding from that list all  
9 of the trust obligations that include all of the  
10 things that Justice Kavanaugh asked about you,  
11 health clinics, education, marital relations,  
12 Indian women who are married to white men.

13           These are all outside the three areas  
14 you've talked about, but Congress has legislated  
15 in them, and, certainly, as far back as the  
16 founding of our Constitution, everyone  
17 understood plenary meant anything that had to do  
18 with the intercourse with Indians, and then,  
19 clearly, with the trust obligation, the United  
20 States took, as your colleague said at the  
21 beginning, took over this dependent sovereign  
22 nation and its members.

23           MR. STONE: Your Honor, I'd like to  
24 begin with your observations regarding the trust  
25 relationship and then go backwards to Story and

1 those uses of intercourse, if you will.

2           The -- regarding the trust obligation  
3 in Menominee Tribe of Wisconsin, or Menominee  
4 Band of Wisconsin Indians, and Jicarilla Apache  
5 Nation, this Court made clear that, of course,  
6 the Court has sometimes described a guardianship  
7 and ward relationship, a trust relationship. It  
8 has used a number of essentially metaphors to  
9 describe the relationship between the United  
10 States and the tribes.

11           But the obligations underneath that  
12 trust -- this is a -- this is a core component  
13 of Jicarilla -- come from positive law. They  
14 come from statutes which dictate obligations by  
15 the United States. We certainly don't doubt  
16 that.

17           However, they do not have a common law  
18 component where because there is, in fact, a  
19 trust, a trust relationship, that, therefore,  
20 the United States has plenary power to do as it  
21 wishes to Indians wherever.

22           So regarding the historical  
23 understanding of intercourse, speaking  
24 specifically about Justice Story's commentaries,  
25 which my friends on the other side cite, he

1 speaks about commerce and then speaks about  
2 trade and intercourse and compares intercourse  
3 with navigation, just as this Court did in  
4 *Gibbons v. Ogden*, which is to say, in Story's  
5 example, a rule, for example, about how foreign  
6 vessels are to dock in the United States,  
7 control over channels of commerce.

8 At no point did Story comment on there  
9 being a general Indian affairs power.

10 JUSTICE GORSUCH: Counsel, I'm sorry  
11 to interrupt, but this -- this new rule would --  
12 would, I think, take a huge bite out of Title 25  
13 of the U.S. Code, which regulates the federal  
14 government's relationship with -- with tribal  
15 members.

16 There are healthcare provisions that  
17 Congress promises to Native Americans off  
18 reservation. That doesn't seem to fall in any  
19 of your buckets. Congress has permitted tribes  
20 to exercise power over environmental regulations  
21 that have indirect effects off reservation.  
22 That would -- that would seem to go too.

23 We have laws that promise Native  
24 Americans access to sacred sites off reservation  
25 and religious liberties off reservation. That

1 -- that would seem to go. And I'm not even sure  
2 maybe the liquor sale, those old precedents, but  
3 maybe that's commerce. I don't know.

4 But there would be a lot that would be  
5 bitten out of Title 25. We'd be busy for the  
6 next many years striking things down.

7 MR. STONE: I don't think that's the  
8 case, Your Honor, and I'd like to start with  
9 Morton, which I think provides the first clue  
10 that that's not the case.

11 When Morton was describing why the  
12 kind of preference that it -- that it recognized  
13 would not violate equal protection, was a case  
14 that's --

15 JUSTICE GORSUCH: I'm not talking  
16 about equal protection. I'm talking about  
17 Article I.

18 MR. STONE: I -- I -- I understand,  
19 Your Honor, but it was describing that virtually  
20 every Indian preference in Title 25 depended on  
21 a conjunction of an identifiable tribe of  
22 recognized Indians on reservations.

23 JUSTICE GORSUCH: But that's not --  
24 that's simply not true. I mean, you can state  
25 that at the podium, but, if I look through Title

1 25, there are healthcare promises to individual  
2 Native Americans who live in urban areas.

3 MR. STONE: So, first of all --

4 JUSTICE GORSUCH: Let's just take that  
5 one. Gone?

6 MR. STONE: First of all, Your Honor,  
7 that strikes me as commerce, at least -- at  
8 least as this Court has --

9 JUSTICE GORSUCH: Healthcare is ---

10 MR. STONE: -- construed interstate  
11 commerce.

12 JUSTICE GORSUCH: So we're back to  
13 that. Okay. So healthcare is commerce. It's  
14 just this isn't --

15 MR. STONE: First of all --

16 JUSTICE GORSUCH: -- whatever this is.

17 MR. STONE: No, child adoptions are  
18 not commerce. They simply are not. The  
19 provision --

20 JUSTICE GORSUCH: But health -- but  
21 healthcare is?

22 MR. STONE: Yes, Your Honor.

23 JUSTICE GORSUCH: Okay. And -- and  
24 environmental laws allowing regulation  
25 off-reservation effects, that's -- that's --



1 that falls within commerce, but this doesn't?

2 MR. STONE: Entirely plausible. It's  
3 a function of either interstate or -- either  
4 interstate commerce or --

5 JUSTICE GORSUCH: How about -- how  
6 about religious liberties and -- and the right  
7 to access sites off -- off-reservation? Is that  
8 commerce?

9 MR. STONE: Not commerce, Your Honor,  
10 but that sounds especially if there's a  
11 discriminatory component in the courts' --

12 JUSTICE GORSUCH: No.

13 MR. STONE: -- or in the commerce --  
14 Congress's Section 5 powers.

15 JUSTICE GORSUCH: No, it's -- no,  
16 you're -- no, the law just says you get access  
17 to -- to places, and it preempts state law.

18 MR. STONE: Then there might be a  
19 Title --

20 JUSTICE GORSUCH: That might ---

21 MR. STONE: There might be an Article  
22 I problem for the same reason why there was in  
23 RFRA.

24 JUSTICE GORSUCH: Like I say, I think  
25 there's a lot that you're asking us to -- we're

1 going to be busy, counsel, if this is the line  
2 we're going to draw. Very, very busy.

3 MR. STONE: We are not requesting that  
4 this Court shrink the plenary power it's  
5 recognized one bit. Everything that has been  
6 upheld previously on the same bases it's been  
7 upheld previously is --

8 JUSTICE GORSUCH: And do you agree  
9 with your colleague on the -- who spoke earlier  
10 that Congress could effectively do this same  
11 law, maybe with a few nibbles around the edges,  
12 commandeering, whatever, but could -- could --  
13 could adopt something like ICWA through a treaty  
14 power and through the Spending Clause?

15 MR. STONE: I think the problem on the  
16 treaty power side is that it would provoke the  
17 question this Court left open in Bond, which is  
18 the question of whether or not Congress may  
19 legislate pursuant to a treaty in a way that  
20 would exceed its Article I powers or other  
21 limits in the Constitution. I don't know what  
22 the answer to that question is, Your Honor, but  
23 that would be squarely presented at that point.

24 JUSTICE GORSUCH: Spending Clause?

25 MR. STONE: Spending Clause, at least

1 the equal protection problem would remain at  
2 least for that -- for purposes of the Spending  
3 Clause. It would get around the  
4 anti-commandeering problems --

5 JUSTICE GORSUCH: So this is a magic  
6 words problem we have here today?

7 MR. STONE: Certainly not, Your Honor.  
8 Congress is not free as a matter of fact to  
9 regulate 50 state child -- 50 state child  
10 adoption proceedings on the basis of race  
11 regardless of what it calls it.

12 JUSTICE BARRETT: General --

13 JUSTICE SOTOMAYOR: Can I ask you a  
14 question? I'm going to list a series of  
15 statutes, and I just want a yes or no, does  
16 Congress have the power to pass this statute,  
17 and, second, why isn't it or is it  
18 anti-commandeering, okay?

19 The statute protecting service members  
20 from default judgments, including in child  
21 custody cases, which requires notice,  
22 appointment of counsel, stays of proceedings,  
23 and in some cases, a setting aside of judgment.

24 Does Congress have the power to pass  
25 that?

1 MR. STONE: Only under

2 anti-commandeering problems or Article I?

3 JUSTICE SOTOMAYOR: I said under

4 Article I.

5 MR. STONE: Under -- oh, under Article

6 I, yes, that's fine for Article I purposes.

7 JUSTICE SOTOMAYOR: Now you think it's

8 a violation of the anti-commandeering statute?

9 MR. STONE: Yes, Your Honor.

10 JUSTICE SOTOMAYOR: The statute on

11 inter-country adoptions, which says that a state

12 court must verify certain evidence and make

13 certain determinations. Inter-country an

14 adoptions, foreign power, right? Yes? Is this

15 anti-commandeering also?

16 MR. STONE: May I?

17 CHIEF JUSTICE ROBERTS: Yes.

18 MR. STONE: I would have to know more

19 about the treaty --

20 JUSTICE SOTOMAYOR: That's a --

21 MR. STONE: It would not violate

22 Article I because of the treaty.

23 JUSTICE SOTOMAYOR: I just said to

24 you it says that a --

25 MR. STONE: I would have to know more

1 details.

2 JUSTICE SOTOMAYOR: -- that a state  
3 court must verify certain evidence and make  
4 certain determinations before it permits the  
5 inter-country adoption.

6 MR. STONE: My first instinct is that  
7 that is right on the line. The verify component  
8 sounds as though it would be anti-commandeering.

9 JUSTICE SOTOMAYOR: I've gone through  
10 -- your light is on. I'll wait to finish my  
11 examples.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Justice Thomas?

15 Justice Alito?

16 JUSTICE SOTOMAYOR: All right. Then  
17 the 17 --

18 (Laughter.)

19 JUSTICE SOTOMAYOR: -- the 1799 Trade  
20 and Intercourse Act, which requires state courts  
21 to take proper bail for certain individuals  
22 arrested by federal authorities. Can the  
23 government do that to state courts?

24 MR. STONE: Article I, yes.  
25 Anti-commandeering, no.

1 JUSTICE SOTOMAYOR: Okay. The 1834  
2 Trade and Intercourse Act that sets the standard  
3 of proof in property disputes involving Indians?

4 MR. STONE: Certainly, Your Honor, in  
5 part because those were specifically applying to  
6 either United States territories or, as this  
7 Court observed in Castro-Huerta, on Indian  
8 reservations, which at that point were  
9 understood functionally like federal enclaves.  
10 That's completely fine.

11 JUSTICE SOTOMAYOR: How about a law  
12 from 1888 setting forth certain evidence that an  
13 Indian woman could use in state court to prove  
14 that there was a common law marriage? Could  
15 they do that?

16 MR. STONE: I don't know, Your Honor.  
17 I have to see more about the statute because,  
18 for example, if there were a geographic  
19 component and a tribal component, that might  
20 justify it.

21 JUSTICE SOTOMAYOR: Assuming there's  
22 not?

23 MR. STONE: Assuming there's not --

24 JUSTICE SOTOMAYOR: Anywhere in any  
25 state court --

1 MR. STONE: -- I don't think so.

2 JUSTICE SOTOMAYOR: -- they -- they  
3 don't have Article I and they -- it's  
4 anti-commandeering violation, both?

5 MR. STONE: It's that it would be an  
6 anti-commandeering violation. It might --  
7 depending on the rest of the statute, it may or  
8 may not be an Article I violation.

9 JUSTICE SOTOMAYOR: How about a  
10 statute that says that state law enforcement can  
11 enforce immigration law so long as they follow  
12 certain minimum procedures? Why isn't that  
13 anti-commandeering?

14 MR. STONE: Because it says "can." It  
15 allows -- the statute allows the states to  
16 choose to do so or not.

17 JUSTICE SOTOMAYOR: All right.

18 MR. STONE: For the same reason that  
19 if Congress says you may regulate or we will but  
20 does not force states to do so. That's not a  
21 commandeering violation.

22 JUSTICE SOTOMAYOR: Thank you,  
23 counsel.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: General, I thought I'd

1 just give you a chance to respond to a reaction  
2 I had to your brief, and the reaction was that  
3 there is an extraordinary amount of Texas's view  
4 of policy in your brief. So I'll just read you  
5 a few things.

6           You say that ICWA subordinates the  
7 needs of Indian children, that it results in  
8 chaotic and often tragic outcomes, that it  
9 returns children to unsafe environments, that it  
10 excuses physical abuse, that it contributes to  
11 the alarming statistics surrounding Indian child  
12 welfare. I could go on. I haven't really even  
13 touched the surface.

14           Now this may be Texas's view. It's --  
15 it's not a view that any other state has told us  
16 it -- it shares. I don't know whether Texas's  
17 view are right or not. I don't have any policy  
18 views in this area to speak of. I don't know  
19 enough.

20           I mean, the point is courts don't know  
21 enough, really. This is a matter for Congress,  
22 isn't it? It's not a matter for the courts to  
23 decide whether ICWA does these terrible things  
24 or whether ICWA doesn't do any of them? Isn't  
25 that really Congress's judgment that we're



1 supposed to respect?

2 MR. STONE: Two parts, Your Honor.  
3 The first is I agree that those observations,  
4 those -- those statements of Texas's views have  
5 nothing to do with non-delegation -- our  
6 non-delegation and anti-commandeering or Article  
7 I challenges whatsoever. Those live or die on  
8 various legal principles that are not those.

9 JUSTICE KAGAN: They're just  
10 atmosphere?

11 MR. STONE: They're in part  
12 atmosphere, yes, Your Honor, in part because  
13 there's a dispute about whether or not equal  
14 protection -- the equal protection standard here  
15 is rational basis or strict scrutiny.

16 Now my friends on the other side  
17 haven't attempted to defend this as a matter of  
18 strict scrutiny, and so, to the extent that  
19 Congress is describing that it has a certain  
20 purpose, the fact that that purpose has been  
21 woefully unmet by the actual effects of ICWA is  
22 relevant for purposes of this Court's albeit  
23 quite forgiving rational basis standard.

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 JUSTICE GORSUCH: You agree that  
3 Congress could do something like ICWA if it were  
4 limited to children on reservations?

5 MR. STONE: Absolutely, Your Honor.  
6 If it were limited to something -- if it were  
7 only applying to tribal members on tribal  
8 reservations.

9 JUSTICE GORSUCH: Okay.

10 MR. STONE: At least for tribal  
11 courts, it could give full jurisdiction to them.

12 JUSTICE GORSUCH: How do we deal with  
13 the fact that -- you know, we talked about  
14 reservations throughout this conversation and in  
15 the briefs. But Indian land throughout the  
16 western United States, as I'm sure you  
17 appreciate, after the post- -- after the  
18 allotment era is full of checkerboards, and so  
19 you're going to have children who may be on  
20 allotted Indian land or next door to it, not on  
21 allotted Indian land.

22 And I -- part of what you're doing --  
23 your argument would encourage is for people to  
24 keep their children on Indian land, not  
25 necessarily allow them to be foster-cared off

1 Indian land, create a disincentive and also just  
2 a massive amount of confusion if everything  
3 depends upon the happenstance of geography.

4 MR. STONE: Congress certainly has the  
5 power, if it wished, to be able to take new  
6 lands and essentially add them to allotments or  
7 reservations or to sort of deem for purposes of  
8 Article I a -- you know, an Indian land or a  
9 place of Indian land. This is the reservation  
10 or relevant Indian lands for purposes of what  
11 we're discussing, how we're acting upon an  
12 Indian tribe.

13 It might be the case that Congress  
14 actually has to appropriate money to take title  
15 to some of those provisions, but that would be  
16 the sort of administrative work that Congress  
17 can still do.

18 JUSTICE GORSUCH: The checkerboard  
19 problem just would persist?

20 MR. STONE: Unless Congress took  
21 actions --

22 JUSTICE GORSUCH: Yeah.

23 MR. STONE: -- to fix it, which it  
24 easily could with its enumerated powers.

25 JUSTICE GORSUCH: And then, finally,

1 it -- it does seem like a lot of this focuses on  
2 -- on the fact that this is family law, but --  
3 and I just want to give you an opportunity to  
4 respond to the same question I asked Mr. McGill  
5 on this, which is really two parts of it.

6 One is the federal government often  
7 plays a role in mediating disputes between  
8 sovereigns in the family law area, whether it's  
9 the Hague Convention internationally or whether  
10 the Parent Kidnapping Act domestically. So why  
11 would it be awkward to think that Congress could  
12 exercise a similar authority with respect to  
13 disagreements between state sovereigns and  
14 tribal sovereigns?

15 MR. STONE: So -- so two points, Your  
16 Honor. The first, speaking of the Hague, of  
17 course, those are treaties between equal, full  
18 sovereign nations that are agreed to or not on  
19 the basis of whether those sovereigns each have  
20 a chance to walk away.

21 The most fundamental difference here,  
22 of course, is that states have no choice to walk  
23 away from ICWA. ICWA --

24 JUSTICE GORSUCH: States have no  
25 choice to walk -- they have to apply the Hague

1 Convention and they have to apply the Parent  
2 Kidnapping Act. They've got no choice in the  
3 matter.

4 MR. STONE: But the point is there's  
5 no mediating as between tribes and states on  
6 sovereigns. It's the United States saying you,  
7 States, shall do this or through a combination  
8 of --

9 JUSTICE GORSUCH: That's exactly what  
10 it does in the Hague Convention, counsel, and  
11 the Parent Kidnapping Act. It says, state  
12 courts, you shall do this. It's a rule of  
13 decision that it sets forth.

14 MR. STONE: And -- and for purposes of  
15 treaties, the Constitution recognizes that is an  
16 exclusive federal operation by conjunction of  
17 the power in Article II and removal of that from  
18 the states in Article I, Section 10.

19 JUSTICE GORSUCH: Okay. So we're back  
20 to, if they did this through treaty, it would be  
21 okay.

22 MR. STONE: Or at least it would be a  
23 lot closer.

24 JUSTICE GORSUCH: All right. And then  
25 how about the fact that the federal government

1 has been heavily involved in domestic affairs on  
2 -- with respect to Native American children  
3 throughout our history, whether it's through  
4 treaties, orphan children, or whether it was  
5 through the -- the boarding school saga of the  
6 last century? Why isn't that some evidence of  
7 -- of -- of plenary power in this area too?

8 MR. STONE: Well, in part, because,  
9 for example, with boarding schools, just the  
10 ordinary powers over territory and property or  
11 otherwise ordinary appropriation --

12 JUSTICE GORSUCH: They took children  
13 off-reservation, counsel.

14 MR. STONE: I -- I understand that,  
15 Your Honor. And I understand that there is no  
16 getting around the fact that both federal and  
17 state history regarding Indian tribes carries a  
18 variety of very shameful and terrible elements.

19 JUSTICE GORSUCH: You're -- you're --  
20 you're saying it's all linked to territory.  
21 That one wasn't.

22 MR. STONE: The problem, Your Honor --

23 JUSTICE GORSUCH: The same thing with  
24 all the treaties with respect to Native American  
25 orphans throughout the history of the country.

1           MR. STONE: The fact that there is a  
2 terrible problem Congress is attempting to  
3 remedy does not necessarily mean it has Article  
4 I power.

5           After all, Congress attempted to -- to  
6 remedy the nationwide problem of vicious  
7 domestic violence. And this Court said that  
8 VAWA, nonetheless, fell outside the Court's --  
9 or outside Congress's Article I powers.

10           JUSTICE GORSUCH: Thank you.

11           CHIEF JUSTICE ROBERTS: Justice  
12 Kavanaugh?

13           JUSTICE KAVANAUGH: I want to ask  
14 about the equal protection issue quickly.

15           The equal protection issue is  
16 difficult, I think, because we have to find the  
17 line between two fundamental and -- fundamental  
18 and critical constitutional values.

19           So, on the one hand, the great respect  
20 for tribal self-government for the success of  
21 Indian tribes with Indian people's with  
22 recognition of the history of oppression and  
23 discrimination against tribes and people. So  
24 that's on the one hand.

25           On the other hand, the fundamental

1 principle we don't treat people differently on  
2 account of their race or ethnicity or ancestry,  
3 equal justice under law, I don't think we would  
4 ever allow, as the Court suggested in *Palmore* in  
5 1984, Congress to say that white parents should  
6 get a preference for white children in adoption  
7 or that Latino parents should get a preference  
8 for Latino children in adoption proceedings. I  
9 don't think that would be permitted under that  
10 principle of equal justice that we recognized in  
11 *Palmore*.

12 So those are the two principles on  
13 equal protection that I think focus the inquiry.

14 How do we draw the line?

15 MR. STONE: Well, Your Honor, I think  
16 first you look to *Mancari* itself, which took a  
17 first attempt at drawing this line. And as  
18 described in *Rice* and as applied from *Mancari* in  
19 the six cases that immediately followed, there  
20 were always at least two necessary  
21 preconditions, again, describing *Rice* now.

22 One, that the preference or the  
23 discriminatory rule or set-aside always reached  
24 only -- and this is in *Rice* -- only members of a  
25 federally recognized Indian tribe because that



1 was the component that made it clear that you  
2 were dealing actually with the Indian tribe as a  
3 body and the people who constituted that body  
4 and not on the basis of race.

5           And then, second, Mancari saw as  
6 significant that each of the preferences that it  
7 otherwise understood operated on or at least  
8 near an Indian reservation because the political  
9 preference related to self-government and  
10 analogizes -- analogized to a couple of things  
11 to individuals who sought to serve a municipal  
12 government, to be able to promote efficient  
13 delivery of services, to the territorial  
14 requirements of serving an office in the United  
15 States Constitution.

16           And so those are the two components  
17 Mancari looked at as vital. ICWA includes  
18 neither. It operates only off of tribal  
19 reservations. It does not require a child who  
20 will be subjected to ICWA to be a member of the  
21 tribe. And I think that puts this clearly on  
22 the invidious race discrimination side of a very  
23 tricky line you're highlighting.

24           JUSTICE KAVANAUGH: Thank you.

25           CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: General Stone, I  
3 want to take you back to the active efforts  
4 provision.

5 One response that the government has  
6 is that the state could just choose not -- could  
7 walk away, essentially, and, certainly, private  
8 parties have the option to participate or not in  
9 termination of rights proceedings or seeking  
10 foster care placement.

11 How would that work? Could Texas walk  
12 away? You know, if you had a child who was a  
13 member of a tribe and was in a situation in  
14 which the child was in danger or, you know, like  
15 the Brackeen children here, like, you know, YRJ,  
16 could Texas choose -- could the Texas agency  
17 choose not to intervene or seek a foster care  
18 placement for the child?

19 MR. STONE: First of all, as a matter  
20 of Texas substantive law, no. But putting that  
21 aside, even if Texas substantive law allowed  
22 that, it would be very strange for the federal  
23 government to say this isn't commandeering  
24 because you can always just stop, you would just  
25 not do it altogether, when it's talking about a

1 core police power, which is saying the health --  
2 the health, safety, and welfare of vulnerable  
3 children.

4 So I think the fact that that is the  
5 -- the sort of component they're offering, aside  
6 from I have no idea how as a practical matter  
7 Texas could do that, the fact they're saying do  
8 it our way or else I think is more in the nature  
9 of a confession than an explanation.

10 JUSTICE BARRETT: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Jackson?

13 JUSTICE JACKSON: Yes. So, in the  
14 Mancari case, we said "the plenary power of  
15 Congress to deal with the special problems of  
16 Indians is drawn both explicitly and implicitly  
17 from the Constitution itself."

18 Do you agree with that proposition?

19 MR. STONE: No, Your Honor, because we  
20 believe that at least some components of the  
21 plenary power are wrong as an original matter,  
22 but we are not challenging them for purposes of  
23 this case.

24 JUSTICE JACKSON: All right. So we  
25 assume --

1 MR. STONE: To accept them, yes.

2 JUSTICE JACKSON: You accept this.

3 Okay. What -- what I'm worried about  
4 is what if the special problem of the Indians is  
5 the manner in which a state is handling custody  
6 determinations? Is the manner in which  
7 placement determinations are being made, are  
8 these children being snatched from their homes,  
9 et cetera, et cetera, as a historical matter?

10 I am not at all sure that  
11 anti-commandeering principles would prohibit the  
12 federal government, who has plenary power over  
13 solving special problems of Indians, to direct a  
14 state in light of this power to do something  
15 about it.

16 Justice Alito says they couldn't --  
17 could they legislate? I don't know that I can  
18 see that they couldn't given the plenary power.

19 And I'm also worried about the -- the  
20 sort of ahistorical gloss of this because it  
21 seems to me that there is ample evidence  
22 historically that the design of the Constitution  
23 gave the federal government that very power at  
24 the expense of the states, that we had had a  
25 previous set of circumstances in which the

1 federal government and the state government  
2 shared power related to Indian affairs and that  
3 the Constitution came along and gave it to the  
4 federal government.

5 So can you help me to understand in  
6 light of all of those concerns why we would have  
7 anti-commandeering principles at work to thwart  
8 the federal government from exercising the  
9 plenary authority that's been -- it's been given  
10 to deal with the special problems of Indians in  
11 this way?

12 MR. STONE: If you'll allow me to  
13 start with the historical materials and then  
14 I'll turn back to essentially an argument from  
15 precedent, and then, if there are any further  
16 questions, I'd be happy to resolve them.

17 First, just speaking about just sort  
18 of original materials, the original draft of  
19 what eventually became the Indian Commerce  
20 Clause was submitted by James Madison as a power  
21 to -- I'm closely paraphrasing here -- regulate  
22 Indian affairs within the U States.

23 That was revised down by the committee  
24 of 11 to a narrower power to regulate Indian  
25 affairs, which was further revised down to a

1 power to regulate Indian commerce.

2 JUSTICE JACKSON: All right. So what  
3 about the Articles of Confederation? What --  
4 what do we do about the inferences that people,  
5 historians, have told us that what was happening  
6 with the shift from the way in which the power  
7 was structured at that point to the Constitution  
8 was about making sure that the federal  
9 government had certain authority and that this  
10 was one of those areas?

11 MR. STONE: Again, on this two points,  
12 the first being Federalist 42 I think holds part  
13 of the answer, which my friends on the other  
14 side rely on. Federalist 42 specifically cites  
15 the two limitations regarding what was then  
16 Article IX of the Articles of Confederation.

17 And then later, when it describes how  
18 it's removed itself of I think these -- these  
19 embarrassments, it says, and then, therefore,  
20 this whole power will allow regulation of trade.  
21 It uses specifically the word "trade" to  
22 describe the power that has been unshackled by  
23 these two things. Not even commerce more  
24 broadly but trade.

25 So the idea that Federalist 42's

1 understanding of the changes to -- to Article IX  
2 of the -- of the Articles of Confederation would  
3 have expanded to an -- to an all-encompassing  
4 Indian affairs power I think is just in the  
5 teeth of that as --

6 JUSTICE JACKSON: All right. But, in  
7 the actual Constitution, we have commerce and we  
8 have historians that have said that at the time  
9 commerce meant more than trade. It included  
10 intercourse. Justice Sotomayor has brought that  
11 up several times. So what do you say in  
12 response to that?

13 MR. STONE: The problem is here is the  
14 syllogism they're relying on, which is that  
15 commerce means -- can -- can mean trade and  
16 intercourse. Intercourse can mean all  
17 relationships in between men and groups of men;  
18 therefore, commerce means all relationships  
19 between groups of men.

20 In Gibbons, in Story, in other  
21 original sources, intercourse is paired up with  
22 -- specifically in Gibbons, with the word  
23 "navigation" so as to describe what we now would  
24 refer to as the channels of commerce, the  
25 ability to set rules as to what foreign boats

1 may dock in places.

2 So "intercourse" doesn't get  
3 Respondents the way to ICWA. It doesn't even  
4 get them beyond what we would ordinarily think  
5 of as the Commerce Clause now.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 Mr. Kneedler.

9 ORAL ARGUMENT OF EDWIN S. KNEEDLER  
10 ON BEHALF OF THE FEDERAL PARTIES

11 MR. KNEEDLER: Thank you, Mr. Chief  
12 Justice, and may it please the Court:

13 As this Court recognized in Holyfield  
14 and Adoptive Couple, ICWA was enacted in  
15 response to serious harms caused by widespread  
16 child welfare practices that resulted in the  
17 separation of large numbers of Indian families,  
18 often unwarranted, through adoption or foster  
19 placement, usually in non-Indian homes.

20 Over the more than 40 years since its  
21 enactment, ICWA has furnished vital protections  
22 against those practices and has become  
23 integrated in state child welfare practices.  
24 There's no basis for uprooting those practices  
25 or for overturning Congress's considered



1 judgment in enacting ICWA.

2 ICWA, in fact, is a valid exercise of  
3 Congress's power over Indian affairs in several  
4 respects. That power is grounded in the text of  
5 the Constitution, including the Indian Commerce  
6 Clause. It is grounded as well in the  
7 constitutional structure in which Indian tribes  
8 occupy a unique status as dependent sovereigns  
9 to which the United States owes a duty of  
10 protection, and that duty of protection, as this  
11 Court observed in *Kagama*, derives in large  
12 measure from the fact that the national  
13 government and the states aiding it, acting  
14 through treaty and war powers, diminished the  
15 tribes' ability, put them in a position of  
16 dependency, and, as this Court said in *Kagama*,  
17 *Seber*, and other cases, with -- gave rise to a  
18 duty of protection, which in turn encompassed a  
19 power of protection.

20 Congress's efforts to address the  
21 problems in ICWA, protecting family integrity,  
22 kinship, unity, and the integrity and long-term  
23 existence of tribes, lie at the core of  
24 Congress's power under the plenary powers. It  
25 does so by -- not by displacing state authority

1 but simply imposing minimum standards on states'  
2 exercise of that authority by seeing foster care  
3 and adoption in -- in state courts.

4           Petitioners' plea to this Court to set  
5 aside ICWA on its face would undermine those  
6 vital protections that have worked well, as the  
7 amicus brief by 23 states shows, since its  
8 enactment. It would also gravely undermine this  
9 Court's Indian jurisprudence by carving up  
10 Congress's plenary power into discrete  
11 categories, which this Court has never  
12 recognized. And it would undermine the reliance  
13 of Congress, of tribes, of individual members,  
14 and, here, states on Congress's exercise of  
15 power.

16           JUSTICE ALITO: Well, Mr. Kneedler, if  
17 the plenary power has no limits, then, of  
18 course, there isn't any Article I issue for us  
19 to decide. Does it really have no limits in  
20 your view?

21           MR. KNEEDLER: No. Mancari announces  
22 the core of the test, which has to be rationally  
23 related to the fulfillment of Congress's unique  
24 obligations to Indians. So, in -- in that,  
25 there -- it is an implementation of the

1 dependent status and the protection, whether  
2 that comes just from the Indian Commerce Clause  
3 or the amalgamation of Congress's various --  
4 various powers, but it has to be in service of  
5 the obligations to the Indians.

6           And this Court in Mancari said it has  
7 to be reasonable and rationally related to  
8 Congress's fulfillment of its unique powers.  
9 There is, I think, a reasonableness there, but  
10 this is at the core of something that is  
11 reasonable.

12           CHIEF JUSTICE ROBERTS: So rationally  
13 related, is that our usual rational basis test?

14           MR. KNEEDLER: I think Congress's  
15 judgment whether -- whether it -- it does serve  
16 that purpose is entitled to great deference. I  
17 think it may not go all the way to rational  
18 basis because -- I -- I think it's important to  
19 recognize that Congress has acted over the two  
20 centuries since the adoption of the Constitution  
21 in pragmatic ways. When it has been confronted  
22 with a particular problem, it has assessed that  
23 problem. It has come up with what it regards as  
24 the appropriate solution to that problem and has  
25 acted in a reasonable manner. And this Court

1 has said that deference to Congress's judgment  
2 about what is reasonably essential to carry out  
3 the trust responsibility is called for.

4 CHIEF JUSTICE ROBERTS: The --

5 JUSTICE ALITO: Could Congress say --

6 CHIEF JUSTICE ROBERTS: No, no, go  
7 ahead.

8 JUSTICE ALITO: Could Congress go  
9 further than it has gone in ICWA and say that an  
10 Indian child may not be adopted by an -- by a  
11 non-Indian couple under any circumstances?

12 MR. KNEEDLER: I think that would --  
13 that would obviously go further, and I would  
14 want to know the -- the -- the circumstances,  
15 but I would think that would be a difficult law  
16 to defend that --

17 JUSTICE ALITO: That's not rationally  
18 related in the same way that this is? I mean,  
19 it's -- it's more -- I honestly don't -- I've  
20 had this -- had great difficulty dealing with  
21 this Article I question because, if "plenary"  
22 means plenary, Congress can do whatever it  
23 wants, fine. As I said, it's an easy case.  
24 There's nothing there under Article I.

25 But, if there are limits, it's hard

1 for me to see where the limits are. That's  
2 where I -- that's where I need help.

3 MR. KNEEDLER: Well, I -- I think -- I  
4 think the place to start -- frankly, I think  
5 it's difficult to start -- to state one rule  
6 that applies across the board in all the various  
7 circumstances where Congress might act, criminal  
8 laws, education, and healthcare, as Justice  
9 Gorsuch mentioned, child -- child welfare.

10 But what this Court has said -- and --  
11 and, again, I want to come back to this. Seber  
12 was an example where it involved tax exemptions  
13 for property, but the Court -- the Court, in  
14 upholding that, said these tax exemptions are  
15 appropriate in aid of Congress's carrying out  
16 its obligations.

17 JUSTICE ALITO: What about the  
18 boarding school law? Congress had the power to  
19 do that?

20 MR. KNEEDLER: Congress -- Congress  
21 had the power at the time, I -- I -- I think.

22 JUSTICE ALITO: Well, if it were to do  
23 it --

24 MR. KNEEDLER: Seriously misguided.

25 JUSTICE ALITO: -- if it were -- yeah.

1 Okay. If it were to do it tomorrow, would that  
2 fall outside Congress's plenary power?

3 MR. KNEEDLER: Well, I -- it has to be  
4 -- the plenary power, I think there are at least  
5 two -- two things to bear in mind about this. I  
6 think Congress, when dealing with a tribe in its  
7 political capacity, has a great deal of power to  
8 diminish the tribe's or regulate the tribe's  
9 exercise of its governmental authority, like  
10 under the Indian Civil Rights Act, et cetera.  
11 That's -- that's dealing with the tribes as  
12 tribes in a political capacity.

13 I think where Congress is addressing  
14 the protections for individual Indians, either  
15 children, adults, whoever, then that -- that's  
16 what triggers the formulation of the -- of the  
17 trust responsibility or the dependent status of  
18 -- of tribes. It has to be reasonably related  
19 to Congress's unique obligations --

20 JUSTICE ALITO: All right. Could  
21 Congress -- could --

22 MR. KNEEDLER: -- which means it has  
23 to be protective, not harming.

24 JUSTICE ALITO: Could -- could  
25 Congress enact a law that alters the substantive

1 law that states apply in areas like -- like  
2 contracts or torts or rules of evidence when one  
3 of the parties in the case is an Indian?

4 MR. KNEEDLER: I think the mere fact  
5 that the party is an Indian would probably not  
6 be sufficient.

7 JUSTICE ALITO: Why? Why isn't that  
8 rationally related to furthering the interests  
9 of -- of Indians?

10 MR. KNEEDLER: I -- again, I think --  
11 I think, in examining any hypothetical statute  
12 or context, it is necessary to look at the  
13 judgment that Congress made and to know why  
14 Congress made the judgment that it did.

15 In -- in Indian contracts, for  
16 example, there were many, many years where  
17 contracts by individual Indians were not valid  
18 unless approved by the Secretary of the Interior  
19 because of a concern that they were going to be  
20 taken advantage of.

21 So, if there -- if there was that sort  
22 of justification -- and, presumably -- I don't  
23 think we can assume Congress would act in an  
24 arbitrary manner. It would be addressing a  
25 real-world problem in a practical way.

1 JUSTICE ALITO: No, I understand.

2 CHIEF JUSTICE ROBERTS: Well --

3 JUSTICE ALITO: And --

4 CHIEF JUSTICE ROBERTS: No, go ahead.

5 JUSTICE ALITO: Just one -- one more.

6 Honestly, I -- I don't know how to analyze this  
7 question because, if "plenary" means everything,  
8 then -- then it means everything. And,  
9 otherwise, what I've gotten from the briefs and  
10 the arguments is that we have to try to extract  
11 certain rules from our cases, which quite  
12 honestly strike me as a mishmash.

13 But one -- one last one. Could  
14 Congress have required that Indians get  
15 preference in the -- in receiving the COVID  
16 vaccines? Would that be an equal protection  
17 violation in your view?

18 MR. KNEEDLER: Again, I think it might  
19 depend -- if Congress decided to furnish  
20 vaccines to tribes as part of a tribal health  
21 program, I don't know whether you would call  
22 that a preference or whether that's Congress --  
23 aspect of Congress's delivering healthcare. It  
24 might have -- it might have a disparate impact,  
25 if you will, but -- but Congress has a duty to



1 Indians, and -- and it might buy a lot of  
2 vaccines and deliver them.

3 CHIEF JUSTICE ROBERTS: Well --

4 MR. KNEEDLER: But a prescription --

5 CHIEF JUSTICE ROBERTS: -- I don't  
6 want to --

7 MR. KNEEDLER: -- a prescription to a  
8 state, for example, might be quite different.

9 CHIEF JUSTICE ROBERTS: I -- I do want  
10 to follow up on Justice Alito's question.

11 There's a limited number of vaccines.  
12 Can the federal government decide to distribute  
13 those to -- to Indians and not others?

14 MR. KNEEDLER: Well --

15 CHIEF JUSTICE ROBERTS: It's a very  
16 simple hypothetical.

17 MR. KNEEDLER: Well, probably not, but  
18 I -- but I -- I just want to caveat that --

19 CHIEF JUSTICE ROBERTS: So the plenary  
20 power doesn't include something like that?

21 MR. KNEEDLER: Well, answering what --  
22 what plenary power means, I think, several  
23 things that it means. There's no subject matter  
24 that is completely off limits just be -- just  
25 because it's Indians. There is no geographic

1 component which renders something completely off  
2 limits.

3 CHIEF JUSTICE ROBERTS: But there's  
4 something about distributing vaccines, a limited  
5 supply, that is, you suggested, I guess, that it  
6 may not be within the plenary power?

7 MR. KNEEDLER: Well, in -- in a  
8 Court's reviewing of something of -- that  
9 Congress has done in the exercise of its plenary  
10 power, again, the -- the test the Court has  
11 applied, it used different formulations, but --

12 CHIEF JUSTICE ROBERTS: Is that the  
13 reasonably essential?

14 MR. KNEEDLER: Reasonably essential,  
15 appropriate, not arbitrary.

16 CHIEF JUSTICE ROBERTS: What -- what  
17 in the world does that mean? What -- i mean, if  
18 it's essential, it's essential. If it's  
19 reasonable -- but what's reasonably essential?

20 MR. KNEEDLER: Well, reasonably  
21 essential is not a familiar term in -- in -- in  
22 -- in the way --

23 CHIEF JUSTICE ROBERTS: In English?

24 (Laughter.)

25 MR. KNEEDLER: But -- but -- in -- in

1 -- in jurisprudence, but that's followed by  
2 deference has to be given to Congress. And --  
3 and, you know, if -- if the -- if the furnishing  
4 of vaccines to the tribe was part of a -- a  
5 general program to furnish vaccines to  
6 underserved communities, I mean, it would  
7 depend.

8 CHIEF JUSTICE ROBERTS: No. I guess  
9 this is the point. You're arguing for special  
10 treatment with respect to Indians. So why does  
11 it matter if it's part of a program to serve  
12 underprivileged communities?

13 MR. KNEEDLER: It -- it -- it -- it  
14 may not. But I -- but I don't think -- Congress  
15 has not done the sort of thing that you are  
16 describing. Congress --

17 JUSTICE JACKSON: But, Mr. Kneedler, I  
18 thought that your answer to the Chief was going  
19 to be that that issue was not really teeing up a  
20 question about the plenary power, that the  
21 issues that they have identified, I would think,  
22 would be analyzed under the equal protection  
23 clause, and that's sort of a separate  
24 constitutional basis for it.

25 MR. KNEEDLER: Yeah. That would --

1 that -- that -- that -- that would be, although  
2 that also has a rational basis, and --

3 CHIEF JUSTICE ROBERTS: Well, but  
4 there are two questions: one, whether you can  
5 do it in the first place, which is the plenary  
6 power question, then whether you can do it in a  
7 way that distinguishes between polities that  
8 have -- with which the federal government has a  
9 special trust relationship.

10 MR. KNEEDLER: I -- I -- I -- I think  
11 these two questions raise -- it may all be under  
12 the plenary power -- they raise an ends mean.  
13 There is no doubt that furnishing vaccines to  
14 Indians, at -- at least if they have some tribal  
15 connection or within the scope of people  
16 eligible for Indian healthcare services, there's  
17 no doubt that that is a valid means or valid end  
18 for Congress's action.

19 The question would be whether the  
20 approach it took is a reasonable one or, rather,  
21 it is arbitrary. And those -- those require  
22 some judgment, some assessment of Congress's  
23 judgment, to which --

24 CHIEF JUSTICE ROBERTS: But I have, I  
25 mentioned to Mr. McGill, difficulty

1 understanding how the placement priorities work.  
2 So maybe I'll try an example.

3 Let's say there's a six-month-old baby  
4 that had been born to an Indian couple and the  
5 Indian couple for whatever reason is no  
6 longer -- no longer there. And there are also  
7 no extended family members in -- in the tribe.

8 A non-Indian couple comes forward and  
9 says we would like to adopt the six-month-old  
10 baby, and they check all the boxes under, you  
11 know, best interests of the child. In other  
12 words, in normal circumstances, this would be a  
13 perfect placement for the child.

14 But non-family members of the tribe  
15 say that, no, they think it would be better for  
16 the child to be raised with the tribe on the  
17 reservation.

18 Does -- does that priority trump the  
19 other best interest finding?

20 MR. KNEEDLER: Well, several questions  
21 about that. When Congress enacted -- or, sorry,  
22 answers. When Congress enacted ICWA, it was  
23 very concerned about the application of the best  
24 interests of the child standard because it led  
25 to subjective judgments about -- by state

1 welfare agencies --

2 CHIEF JUSTICE ROBERTS: Okay. Let's  
3 assume -- let's assume that it's a good faith  
4 and reasonable application of the best interest  
5 standard.

6 MR. KNEEDLER: But -- but what -- but  
7 what -- what Congress did was to adopt objective  
8 standards, which is the -- the child -- which is  
9 the priorities, and, with respect to tribal  
10 members, there is -- there is an extended  
11 kinship proposition there.

12 CHIEF JUSTICE ROBERTS: So does that  
13 priority displace the state court, state  
14 adoption agency, determination of the best  
15 interests of the child?

16 MR. KNEEDLER: Well, the -- the -- the  
17 agency would have to determine that the -- that  
18 the tribal family was qualified --

19 CHIEF JUSTICE ROBERTS: Yeah.

20 MR. KNEEDLER: -- first of all. And  
21 then, secondly, the -- that placement, it --  
22 it's a rebuttable presumption and is not  
23 absolute. So there is a good cause --

24 CHIEF JUSTICE ROBERTS: Rebuttable  
25 presumption that the child would be placed with

1 the non-family members of the child?

2 MR. KNEEDLER: Right, that's one way  
3 -- that's one way to describe it. But then,  
4 yes, I mean --

5 CHIEF JUSTICE ROBERTS: Well, so okay.  
6 So my point is that in that particular  
7 situation, the best interests of the child would  
8 be subordinated to the interests of the tribe?

9 MR. KNEEDLER: No, but -- but I --

10 CHIEF JUSTICE ROBERTS: The interests  
11 of non-family members.

12 MR. KNEEDLER: When Congress enacted  
13 ICWA in Section 1902, it said it was  
14 implementing the best interests of the child.  
15 The -- the -- the -- the -- the -- the  
16 proposition of best interests --

17 CHIEF JUSTICE ROBERTS: So then -- so  
18 you're saying Congress and ICWA made a  
19 determination that it is in the best interests  
20 of the child to remain with non-family members  
21 of the tribe on the reservation in every case,  
22 regardless of what the alternative is?

23 MR. KNEEDLER: Well, no, it's not  
24 every case. What Congress did was enact a -- a  
25 framework, an overall statute that, as -- as I

1 said -- and -- and this is, if you look at the  
2 amicus brief by the -- by the Casey Foundation,  
3 it described that this reflects child welfare  
4 practices that -- that have come to more closely  
5 resemble what ICWA does, in fact, by -- by  
6 looking to not just the immediate family but to  
7 extended kin. Congress made judgments when it  
8 enacted --

9 CHIEF JUSTICE ROBERTS: So I guess --  
10 and -- and I am having trouble figuring out how  
11 this actually works in -- in practice in a  
12 concrete case.

13 In the hypothetical -- hypothetical  
14 that I posed, would the interests of non-family  
15 members of the tribe trump the state agency  
16 determination, they make these determinations  
17 every day, of what's in the best interests of  
18 the child?

19 Not with respect to placement with the  
20 other -- the other couple we're talking about.  
21 It's not that they're saying, you know, it's not  
22 going to be in the best interests of the child  
23 to be placed with the family on the reservation,  
24 but there are other things that they take into  
25 account.



1           MR. KNEEDLER: But ICWA does not  
2 operate that way, with respect. The -- the  
3 first question is that you -- if -- if no  
4 extended family members, and extended family can  
5 include how -- how the tribe --

6           CHIEF JUSTICE ROBERTS: No, no. My  
7 hypothetical was members of the tribe.

8           MR. KNEEDLER: Was no -- right. So it  
9 goes to -- it goes to the second preference for  
10 a couple in -- or parents in that tribe. But  
11 that is subject to the good cause exception. So  
12 --

13          CHIEF JUSTICE ROBERTS: Okay. Does  
14 the good cause exception -- how does that work?  
15 Because it's not -- it's something different  
16 than the best interests of the child?

17          MR. KNEEDLER: It -- it's not  
18 articulated that way. Maybe some of the same  
19 considerations could come in. But, again,  
20 Congress was -- and, for example, if the parent  
21 -- the -- the preference of the parents is given  
22 weight, then sometimes --

23          CHIEF JUSTICE ROBERTS: Yeah, but,  
24 again, my hypothetical said that the parents are  
25 no longer on the scene.

1           MR. KNEEDLER: But -- okay. There --  
2 there are cases where there are.

3           CHIEF JUSTICE ROBERTS: It happens.

4           MR. KNEEDLER: Yeah, no, no, it does,  
5 but all I'm saying is that the -- I'm giving  
6 examples of why the good cause exception is not  
7 absolute. It could be rebutted in certain ways.

8           It also says should. It does not say  
9 shall or must, which allows for the  
10 consideration of other factors.

11           CHIEF JUSTICE ROBERTS: Could it be  
12 rebutted by the agency saying we have gone  
13 through our normal determinations of what's in  
14 the best interests of the child that we do in  
15 every case, whether, you know, not involving  
16 Indians, and we think that's where the child  
17 should be placed with that couple.

18           Now does the -- do the priorities in  
19 ICWA trump that determination?

20           MR. KNEEDLER: That -- that -- that is  
21 not the determination the -- the agency would  
22 make at the outset, and, again, because that's  
23 what ICWA was concerned about and -- and because  
24 of the subjective judgments that could be made  
25 by child welfare personnel in looking at the

1 family, looking at the financial status of the  
2 family, looking at the housing, and make  
3 judgments that this child should not be there.

4 JUSTICE SOTOMAYOR: Mr. Kneedler, can  
5 I? One can assume two -- two things, following  
6 up on Justice Alito and Justice Roberts' initial  
7 question: If the United States had agreed with  
8 England to supply it first with the vaccine  
9 before it supplied the states, would our foreign  
10 powers permit -- plenary foreign powers permit  
11 the U.S. to do that?

12 MR. KNEEDLER: I think it probably  
13 would, yes.

14 JUSTICE SOTOMAYOR: It -- what stops  
15 --

16 MR. KNEEDLER: Absolutely would, sure.

17 JUSTICE SOTOMAYOR: -- that from  
18 happening, obviously, is that that President  
19 would obviously or more than likely not get  
20 reelected.

21 All right. The same thing if there  
22 was a political judgment that the Indian tribes  
23 required the vaccine first for some rational  
24 reason, 90 percent of the -- of the population  
25 was dying or a huge number more or whatever the

1 reason was, it was a reasonable reason, that  
2 would -- you'd have plenary power to do that,  
3 correct, if you're the --

4 MR. KNEEDLER: As I said, the power to  
5 furnish the vaccines is there whether the --  
6 whether the criteria that it applied in a  
7 particular case -- I mean, they would have to be  
8 reasonable. But we shouldn't assume --

9 JUSTICE SOTOMAYOR: All right. On the  
10 best interests of the child point, okay, going  
11 back to that, one is presuming that the best  
12 interests of the child is to remain with X or Y.  
13 That's a court --

14 MR. KNEEDLER: With what? I'm sorry.

15 JUSTICE SOTOMAYOR: To remain with X  
16 or Y, meaning with a custodian or not. But it  
17 doesn't mean a child is going to be placed with  
18 an unfit parent, correct?

19 MR. KNEEDLER: Right.

20 JUSTICE SOTOMAYOR: An unfit -- all of  
21 these parents, to even be in the running, have  
22 to be competent parents, correct?

23 MR. KNEEDLER: Yes.

24 JUSTICE SOTOMAYOR: Competent care --  
25 custodians.

1 MR. KNEEDLER: Yes.

2 JUSTICE SOTOMAYOR: So now the issue  
3 is one of policy. Where will you place the  
4 child among these competing competent  
5 custodians, correct?

6 MR. KNEEDLER: Yes.

7 JUSTICE SOTOMAYOR: And that goes to  
8 the judgment of -- who should make that  
9 judgment, and what you're saying is Congress has  
10 --

11 MR. KNEEDLER: Congress made that  
12 judgment in particular because it was concerned  
13 about the ordinary operation of the -- and this  
14 Court's decision in Smith versus Organization of  
15 Families makes this point.

16 CHIEF JUSTICE ROBERTS: So there's --  
17 so just so I understand, there's a level. It  
18 has to be competent --

19 JUSTICE SOTOMAYOR: Could you let him  
20 just finish that, Chief?

21 CHIEF JUSTICE ROBERTS: Oh, I'm sorry.  
22 I thought you were --

23 JUSTICE SOTOMAYOR: Yeah. Just let  
24 him finish that part. Go ahead.

25 MR. KNEEDLER: Congress -- Congress

1 was concerned about the sort of free-form or  
2 free-floating application of the best interests  
3 of the -- of the child standard, as this Court  
4 recognized, and that's why it, for example,  
5 imposed the burden of proof to remove -- to  
6 remove the child or for -- or for placements of  
7 the child with -- with someone else.

8           And what it determined is the  
9 arrangement that -- the framework that it set up  
10 in ICWA was in the best interests of the child  
11 because Congress made a judgment that placing  
12 the child with the extended family, failing that  
13 with the tribe, which is -- which is a kinship  
14 community interest, which is -- which is taken  
15 into account in the non-Indian context under  
16 child welfare practices, that was in the best  
17 interests of the child, with the -- with the  
18 occasion or the possibility or the prospect of  
19 individualized exceptions to that --

20           JUSTICE ALITO: Suppose the parents  
21 are --

22           MR. KNEEDLER: -- in a particular  
23 case.

24           CHIEF JUSTICE ROBERTS: Well --

25           JUSTICE SOTOMAYOR: Well, I think --

1 JUSTICE ALITO: Chief?

2 CHIEF JUSTICE ROBERTS: Are -- are you  
3 finished with your answer?

4 MR. KNEEDLER: Yes.

5 (Laughter.)

6 MR. KNEEDLER: Yes.

7 CHIEF JUSTICE ROBERTS: Okay. Because  
8 I -- yeah.

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: Now is -- is  
11 competence the threshold, or, in this priority  
12 standard, is the agency allowed to consider the  
13 relative best interests of the two different  
14 proposed placements?

15 MR. KNEEDLER: I -- I -- I think  
16 ordinarily not, but -- but, as this Court has  
17 said elsewhere, for example, in -- in removing a  
18 child from its parents, the question is not  
19 whether the child would be better off somewhere  
20 else because parents have a fundamental right in  
21 parenting their children.

22 And what -- Congress didn't say this  
23 was a fundamental right of extended family or  
24 tribes, but it -- it thought it was a very  
25 important right that should be recognized and

1 not lightly -- and not lightly taken away  
2 because of the -- the huge numbers of Indian  
3 children who were being taken away from their  
4 families, from their extended families, from  
5 their tribes, from their kin, from their  
6 community, and that was damaging the long-term  
7 interests --

8 CHIEF JUSTICE ROBERTS: Last --

9 MR. KNEEDLER: -- of the tribes.

10 CHIEF JUSTICE ROBERTS: -- last  
11 question. Is the trust relationship, trust  
12 responsibility that the federal government owes  
13 in this area, is that responsibility owed to the  
14 tribe, or is it owed to individual members of  
15 the tribe?

16 MR. KNEEDLER: I think Congress can  
17 conclude that it is owed to both, and it  
18 traditionally has. Congress's power -- and --  
19 and the Holliday decision that was referred to  
20 previously, I think, is very instructive on this  
21 point in a number of reasons. It involved -- it  
22 upheld Congress's ability to engage in the  
23 prohibition on -- on liquor sales in that case  
24 off-reservation. It rejected the proposition  
25 that just because the Indians there were



1 citizens, that that was beyond what -- what  
2 Congress could do. And it -- and it said that  
3 that could be upheld because it was an  
4 appropriate exercise of -- of Congress's power.

5 But it also specifically rejected the  
6 argument that the -- that Congress can only deal  
7 with tribes. It said tribes are made up of  
8 their members, of their constituents.

9 And that's an important thing to  
10 understand about the way ICWA operates. It  
11 operates on the basis of citizenship, that the  
12 definition of Indian child is that the child  
13 must be a member of the tribe or, if not, it has  
14 to -- the child has to be eligible for --

15 JUSTICE ALITO: Well, along those  
16 lines --

17 MR. KNEEDLER: -- membership.

18 JUSTICE ALITO: -- along those lines,  
19 Mr. Kneedler, suppose the parents of a child  
20 that is going to be adopted say we don't want  
21 our child treated as an Indian under ICWA. And  
22 the tribe says, well, this child is eligible for  
23 tribal membership. Or maybe we have enrolled --  
24 we have unilaterally enrolled the child as a  
25 member of the tribe. What happens then?

1           MR. KNEEDLER: Well, if the -- I'm --  
2 I'm not sure. Of all the facts in the  
3 hypothetical, if -- if the parents are giving  
4 the child up for adoption, then that wouldn't  
5 necessarily trigger the -- the preferences or  
6 they wouldn't get dispositive weight because the  
7 -- the parents' desires can be given great  
8 weight in that -- in that circumstance.

9           JUSTICE ALITO: But it would still be  
10 --

11          MR. KNEEDLER: So, if that's --

12          JUSTICE ALITO: -- it would still be  
13 governed by ICWA?

14          MR. KNEEDLER: It's still -- it's  
15 still subject to ICWA, yes. But -- but the --  
16 but -- and this is an important point to  
17 understand. This is a facial challenge to a  
18 statute that has operated for 40 years day to  
19 day in state child welfare agencies. It's  
20 integrated in what they do. And, you know,  
21 there -- there could be -- I mean, what happens  
22 in a particular case depends upon the -- the  
23 state agencies or the private agencies or the --  
24 or the adopting couple --

25          JUSTICE KAVANAUGH: Can I follow up on

1 the Chief's questions? The third preference,  
2 for other Indian families, including families  
3 who are of a different tribe, correct?

4 MR. KNEEDLER: Yes.

5 JUSTICE KAVANAUGH: Okay. And does  
6 the third preference, that preference, ever make  
7 a difference?

8 MR. KNEEDLER: I mean, I don't know  
9 empirically, but they -- but it can in the  
10 following circumstance -- I mean, first of all,  
11 it's important to understand --

12 JUSTICE KAVANAUGH: Meaning that the  
13 decision would have been to give it -- the best  
14 interests would have been with a -- a different  
15 family but for that third preference?

16 MR. KNEEDLER: Well --

17 JUSTICE KAVANAUGH: Does it ever make  
18 a difference?

19 MR. KNEEDLER: -- it -- it very well  
20 could, but there would be very strong reasons  
21 why it would, if I could just explain.

22 JUSTICE KAVANAUGH: No, I -- I think  
23 it would. That's -- yeah.

24 MR. KNEEDLER: Yeah. Because --

25 JUSTICE KAVANAUGH: That's --

1           MR. KNEEDLER: -- you could have a  
2 child, for example, who has parents who are  
3 members of two tribes. ICWA --

4           JUSTICE KAVANAUGH: No, just -- it  
5 applies beyond that circumstance.

6           MR. KNEEDLER: No, no, I know. But  
7 I'm explaining the reasons why it --

8           JUSTICE KAVANAUGH: Yeah.

9           MR. KNEEDLER: -- why it is there.  
10 And, again, this is a -- first of all, it hasn't  
11 -- the third preference has not been raised in  
12 this case at all. Nobody -- no plaintiff in  
13 this case has been affected by it.

14           And -- but -- but I was trying to give  
15 an explanation for why it is there and why  
16 applications of it would -- would, I think --

17           JUSTICE KAVANAUGH: Go ahead.

18           MR. KNEEDLER: -- be obviously okay.  
19 If you have a child who has a parent who's a  
20 member of two tribes, ICWA requires that one be  
21 selected as the primary tribe. But -- but if --  
22 if that -- if for some reason there's not a  
23 suitable foster or adoptive parent who comes  
24 forward, the second tribe would be a logical  
25 place.

1           You also have situations where two  
2       tribes share the same reservation and -- and  
3       there's a lot of interaction, intercourse  
4       between them. Or you have a situation where --  
5       and this is true with the breakup of the great  
6       Sioux Nation in the northern plains, you once  
7       had one -- one great nation that is now divided  
8       up into discrete tribes on different  
9       reservations, but they have common cultural --

10           JUSTICE KAVANAUGH: So -- so, to get  
11       to the heart of my concern about this, you would  
12       agree, I think, but tell me if you disagree,  
13       that Congress couldn't give a preference for  
14       white families for white children, for black  
15       families for black children, for Latino families  
16       for Latino children, for Asian families for  
17       Asian children.

18           MR. KNEEDLER: Yeah.

19           JUSTICE KAVANAUGH: Do you agree with  
20       that?

21           MR. KNEEDLER: Yes.

22           JUSTICE KAVANAUGH: Okay.

23           MR. KNEEDLER: That -- that's purely  
24       based on race. But this is --

25           JUSTICE KAVANAUGH: And this is

1 different because? And I'll let you explain.

2 MR. KNEEDLER: Because it has to do  
3 with Indian tribes. Indian --

4 JUSTICE KAVANAUGH: Including the  
5 third preference, which does not require it be  
6 of the same tribe?

7 MR. KNEEDLER: But it -- but it is a  
8 tribe. It is a tribe with a political  
9 relationship to -- to the United States. If the  
10 child goes there, that -- the child's --  
11 somebody in that -- in that family will be a  
12 tribe -- a member of that tribe.

13 JUSTICE BARRETT: But why -- I don't  
14 understand that. I thought that it swept more  
15 broadly than that, as Justice Kavanaugh was  
16 saying. I thought that you could have -- I  
17 mean, even in your hypothetical where you have a  
18 mother who belongs to one tribe and a father who  
19 belongs to another, maybe I'm misunderstanding  
20 how the third preference works, but I thought  
21 the third preference would kick in and give  
22 preference to someone who -- a couple that  
23 belonged to a different tribe altogether.

24 MR. KNEEDLER: Well, it --

25 JUSTICE BARRETT: Am I

1 misunderstanding that?

2 MR. KNEEDLER: -- it could, but ICWA  
3 operates on the basis of -- of the child's  
4 primary tribe. And if -- and -- but, if you had  
5 a second tribe, that would not -- that wouldn't  
6 come under the first or second preference.

7 JUSTICE BARRETT: It would come under  
8 the third?

9 MR. KNEEDLER: It would come --

10 JUSTICE BARRETT: And so I'm saying --

11 MR. KNEEDLER: -- it would come under  
12 the third.

13 JUSTICE BARRETT: -- if there's no --  
14 there's -- right. I'm saying -- I'm assuming,  
15 as Justice Kavanaugh's question was -- was  
16 assuming, that you get down to the third, so you  
17 didn't have a placement available. The first or  
18 the second preference didn't kick in. You get  
19 down to the third preference. And I guess -- I  
20 mean, I'll get to the heart of my concern, is,  
21 you know, if -- if you're thinking about that  
22 from an equal protection point of view, I mean,  
23 let's assume I agree with you that these are  
24 political classifications, this is just treating  
25 Indian tribes as fungible.

1 MR. KNEEDLER: Well --

2 JUSTICE BARRETT: So let's imagine the  
3 child is a member of the Navajo and is placed  
4 under the third preference with the Cherokee.

5 MR. KNEEDLER: I don't -- I don't  
6 think it rests on the idea that all -- that all  
7 tribes are fungible in the sense that they're  
8 all the same or that all their members are the  
9 same, but what it does rest on is a recognition  
10 that each of those tribes has a political  
11 government-to-government relationship with the  
12 United States.

13 And they have that in common. They --  
14 tribes -- tribes have aligned over the years in  
15 common interests. They have -- Congress  
16 certainly thought this was true -- some common  
17 cultural ties or practices or spiritual  
18 practices. They -- they may not be dispositive,  
19 but it's a recognition that that could be true.

20 The -- the third preference doesn't  
21 come up. In fact, the Petitioners in this case  
22 have not identified any case that fits the  
23 paradigm that -- that I think Justice Kavanaugh  
24 might have been talking about, where you have  
25 somebody -- another tribe with no other sort of



1 connection to the child.

2 A tribe is not just going to  
3 arbitrarily reach out and grab -- grab a child.  
4 They will do it because they have some interest.

5 And it's not a property interest.  
6 Governments have an interest in their citizens  
7 and their children. Consular protection for  
8 aliens from other countries in our -- in our  
9 country is a -- is a vital thing. It's not  
10 property.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Justice Alito, anything further?

14 JUSTICE ALITO: Well, adults can  
15 change their -- their country of their  
16 citizenship.

17 But why isn't Mr. McGill right in  
18 referring to the concept that the tribes have a  
19 proprietary interest in children who are covered  
20 by -- by ICWA?

21 The children don't voluntarily join  
22 the tribe. And in my hypothetical where the --  
23 the parents don't want the child to be treated  
24 as a member of the -- a member of the tribe,  
25 this child is treated as an Indian under ICWA

1 solely based on the child's status as a -- based  
2 on ancestry.

3 MR. KNEEDLER: Well, if the child --  
4 if the child is a member, that is because either  
5 the tribe automatically confers citizenship at  
6 birth, which the United States does for -- in  
7 some circumstances for a U.S. citizen abroad, if  
8 they give birth, that is not an unheard of  
9 proposition.

10 And the parallels between Congress's  
11 dealing with tribes and Congress's dealing with  
12 foreign countries and foreign affairs is -- is  
13 very direct for these purposes. It's dealing  
14 with another sovereign.

15 In fact, that parallel is present in  
16 the Indian Commerce Clause, which is -- which is  
17 written in terms of commerce with foreign  
18 governments and with states.

19 So there's -- there is -- there is  
20 that parallel. And it's also common where, if  
21 the -- if the parents once enrolled the child  
22 but didn't want them to be treated as -- as a  
23 tribal member, children follow -- children don't  
24 make their own decisions. Someone else does.

25 Either citizenship could descend

1 automatically at birth, or -- or when the child  
2 becomes 18, the child might choose to be a -- a  
3 member, which is another important consideration  
4 if the child is placed with somebody in the  
5 tribe.

6 JUSTICE ALITO: What if it's an older  
7 child, not 18, but an older child who can  
8 express the child's preferences, and the child  
9 says I don't want to be treated as an Indian  
10 under ICWA?

11 MR. KNEEDLER: The good cause --  
12 Interior's regulations explicating the good  
13 cause exception say that the wishes of the -- of  
14 the child of -- of -- of a sufficient age, to --  
15 for his preferences to be taken into account.

16 That is a factor and -- and perhaps a  
17 very important one.

18 JUSTICE ALITO: It's taken into  
19 account, but it's not dispositive.

20 MR. KNEEDLER: No, but -- but family  
21 law cases, custody cases are very fact --  
22 fact-specific. And so you can hypothesize a  
23 situation in which maybe it should have been  
24 dispositive but not, but some -- some -- a state  
25 court judge has to make a difficult judgment.

1           And -- and, if there are problems with  
2           that in a particular case, the -- the person  
3           seeking custody could appeal. That was done in  
4           -- in one of the cases in this case.

5           But this is a facial challenge. The  
6           idea that -- that in all of its operations,  
7           under Salerno, it would be necessary to say in  
8           all of its operations it either exceeds  
9           Congress's Article I powers or is a violation of  
10          equal protection. And I think that that is an  
11          untenable position.

12          The statute has been operating for 40  
13          years, and we have 23 states who say it is  
14          working well. We have numerous tribes saying  
15          it's critical to tribal preservation, and that  
16          Congress's judgment 40 years ago remains sound.

17          JUSTICE ALITO: One -- one last  
18          question. Does -- is rational basis the  
19          standard for all classifications that treat  
20          Indians differently from other people, even if  
21          -- even if the classification disfavors them?

22          MR. KNEEDLER: I -- I think ordinarily  
23          the first question there would be whether that  
24          is a -- a valid Article I exercise of power. If  
25          that's what you're asking, you're asking equal

1 protection --

2 JUSTICE ALITO: Yeah, in equal  
3 protection. What's the -- what's the level of  
4 scrutiny for a classification that disfavors  
5 Indians, a rational basis?

6 MR. KNEEDLER: Well, as I said before,  
7 if -- if what Congress does is act on the tribe  
8 in a political manner, saying your -- you know,  
9 your -- your -- your powers are diminished or  
10 expanded, that -- that's a political  
11 classification. And Congress can do things that  
12 tribes might think are -- are not worthy.

13 But, if Congress is acting on  
14 individual members of tribes in a way that is  
15 harmful to them, I don't think that that is  
16 rationally related to the fulfillment of  
17 Congress's obligations to the tribes.

18 That's -- that -- that's a -- that's a  
19 -- a -- a -- I think an important marker that  
20 what Congress is doing has to be reasonably  
21 understood as promoting the welfare of the --  
22 the individuals involved.

23 I think that's an important  
24 limitation. If -- if the boarding school  
25 example were going to arise now, that would be a

1 very serious question. Maybe a hundred years  
2 ago people had a different idea of that.

3 But -- but now it is, I think,  
4 uniformly thought to have been harmful, and  
5 Congress cannot gratuitously do harmful things  
6 to individual -- individual tribal members, just  
7 like it -- it can't do anyone else.

8 This Court's decision in *Moreno* with  
9 respect to equal protection -- equal protection  
10 challenge to a statute that -- that the Court  
11 thought was just outright -- disliked.

12 JUSTICE ALITO: Well, that sounds like  
13 something -- I'll stop with this -- that sounds  
14 like a level of scrutiny that is different from  
15 ordinary rational basis review, and at least  
16 something with -- at least something more than  
17 ordinary rational basis ought to be applied.

18 MR. KNEEDLER: Well, and with --

19 JUSTICE ALITO: So is it -- does --  
20 does that apply either way or only to  
21 classifications that disfavor Indians?

22 MR. KNEEDLER: Again, I think it comes  
23 up both with respect to Article I as it  
24 rationally related to Congress's fulfillment of  
25 its power and then a rational basis test for

1 equal protection, and they overlap, and one  
2 could think of the issues here.

3 But, under -- under the Article I  
4 power, I think it -- it -- it -- it -- it  
5 doesn't cut both ways.

6 JUSTICE ALITO: Okay. Thank you.

7 MR. KNEEDLER: I think Congress has to  
8 -- has to be acting --

9 CHIEF JUSTICE ROBERTS: Justice  
10 Sotomayor, anything further?

11 JUSTICE SOTOMAYOR: I think that what  
12 you were trying to say but I'm not sure is ICWA  
13 has two components: one, if you're a child  
14 who's an Indian member, and we haven't even  
15 addressed that, it seems to me that that's the  
16 quintessential part of ICWA that I find hard to  
17 overturn.

18 If you're a member of a tribe and the  
19 government wants to protect you in a certain  
20 way, you should be -- the government should be  
21 unfettered from that.

22 MR. KNEEDLER: Right, and I -- I  
23 thought that might have been one -- one part of  
24 Justice Alito's question, but I wasn't sure.

25 JUSTICE SOTOMAYOR: All right. But

1 the second part of ICWA subjects a child who's  
2 not a member yet but whose parent is an Indian  
3 tribe membership, and that one, it seems to me  
4 that most of our laws presume that a child will  
5 follow its parents, correct?

6 MR. KNEEDLER: Yes.

7 JUSTICE SOTOMAYOR: Until they're of  
8 age?

9 MR. KNEEDLER: Yes.

10 JUSTICE SOTOMAYOR: Even with  
11 citizenship. Children who are born of parents  
12 abroad I don't think in all circumstances are  
13 automatically considered citizens.

14 MR. KNEEDLER: It depends on the  
15 parents' connection to --

16 JUSTICE SOTOMAYOR: But they can  
17 travel to the U.S. They can -- there's all  
18 sorts of benefits they're given because they're  
19 children of American citizens, but they have to  
20 declare their intent to be a citizen at 18 or  
21 something, correct?

22 MR. KNEEDLER: And -- and the -- this  
23 Court's decision in Holyfield, you know, I  
24 think, reinforces that, that --

25 JUSTICE SOTOMAYOR: So the bottom line



1 is that ICWA says that if you're eligible to be  
2 a member because you're born of an Indian  
3 parent, is no different than any of those laws,  
4 correct?

5 MR. KNEEDLER: Right. No, I think  
6 it's -- citizenship passing by descent is a --  
7 is a common -- has been common throughout our  
8 history. And -- and -- but, here, it's  
9 important to recognize that tribal membership,  
10 tribal citizenship is defined by the tribe.

11 JUSTICE SOTOMAYOR: Correct.

12 MR. KNEEDLER: That's an important --  
13 that's an important aspect of tribal  
14 sovereignty. The United States is not defining  
15 the membership. And that is part and parcel of  
16 recognizing the sovereignty of Indian nations,  
17 which, by the way, are -- not by the way --  
18 centrally mentioned in the Constitution, Indian  
19 tribes. It -- it defines them by being Indians.

20 JUSTICE SOTOMAYOR: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: Mr. -- Mr. Kneedler,  
23 I'm wondering if you could comment on the  
24 various ramifications of adopting some of  
25 Petitioners' theories of the Article I power,

1 and we've heard a few different iterations, but  
2 I'll take General Stone's perhaps as the  
3 clearest cut one.

4           General Stone says Congress has power  
5 where it -- where it is acting out of a  
6 particular treaty and its obligations, where  
7 it's regulating on tribal lands, or where it's  
8 regulating tribal governments qua governments.  
9 And those are the three areas in which Congress  
10 has power, and everything else is outside of  
11 Congress's power.

12           And I'm just wondering what in Article  
13 -- in -- in -- in Title 25 would that exclude?

14           MR. KNEEDLER: Well, the Indian  
15 healthcare program furnishes a lot of services  
16 to Indians who -- some of whom are not actually  
17 formal tribal members, but they are -- a  
18 judgment's been made that they are sufficiently  
19 affiliated with a state tribe or something like  
20 that. There's -- a lot of the Indian Health  
21 Service care is furnished off-reservation.

22           There are -- there's aid to schools  
23 that Indian children attend. There -- but there  
24 would -- there would also be other concerns  
25 historically. And what Congress has done in the

1 past by -- and I mentioned the Holliday case,  
2 which was created criminal offenses for conduct  
3 occurring off a reservation by individual  
4 Indians, and there the Court said it's not just  
5 commerce, it's intercourse, which means  
6 interaction between Indians and non-Indians.

7 So any -- anytime there could be  
8 abuses arising in the context of interaction  
9 between Indians and non-Indians, the potential  
10 is there. It's -- it's not necessarily going to  
11 be all the time. But it's very important in --  
12 not to cut off Congress's ability to make  
13 context-specific judgments when a practical  
14 problem arises.

15 And I think, if the -- if the import  
16 of your question is that if something is behind  
17 -- is -- doesn't fall into one of those  
18 categories precisely, first of all, there would  
19 be litigation about whether it does fall into  
20 that category, but if that means Congress is  
21 about to step into strict scrutiny land under  
22 racial discrimination, that would be, I think,  
23 an enormous --

24 JUSTICE KAGAN: Well, not just the --  
25 I took General Stone to be saying Congress just

1 can't do it. It just doesn't fall within --

2 MR. KNEEDLER: Yes. No.

3 JUSTICE KAGAN: -- Congress's Article  
4 I powers, you know.

5 MR. KNEEDLER: Right. Right. Right.  
6 But, I mean -- so there are two aspects to that.  
7 If it's beyond the powers, is it -- is it racial  
8 discrimination? But I think -- I think that  
9 would be -- that is essentially the shackling of  
10 -- of the federal government's powers under the  
11 Indian Commerce Clause or its more general  
12 powers of protection coming about from the  
13 exercise of the war and treaty powers.

14 That would be in the teeth of -- of  
15 Congress -- the framers' shedding of those  
16 shackles. Whether those shackles were all under  
17 the Indian Commerce Clause or -- or elsewhere,  
18 that -- that was a deliberate choice by the  
19 framers to give Congress plenary power over  
20 Indian affairs. That was reflected in the  
21 contemporary understanding and the Trade and  
22 Intercourse Act, which enacted criminal  
23 penalties for crimes -- over the years, crimes  
24 by Indians against Indians. The classic  
25 intercourse or interaction between Indians and

1 non-Indians.

2 JUSTICE KAGAN: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Gorsuch?

5 Justice Kavanaugh?

6 JUSTICE KAVANAUGH: On your point that  
7 this is a political classification, not a racial  
8 classification, including the third preference,  
9 as I think you said, you're relying on Mancari,  
10 and I just want to understand what you see as  
11 the limits of Mancari, and a couple of the  
12 hypotheticals I asked earlier, could Congress  
13 grant a hiring preference to American Indians  
14 for federal agencies other than the BIA, such as  
15 Treasury or Justice or --

16 MR. KNEEDLER: I -- I think that would  
17 be much more difficult as I stand here.

18 JUSTICE KAVANAUGH: And -- and why is  
19 that?

20 MR. KNEEDLER: Because the preference  
21 in Mancari was at the BIA. It was the agency  
22 that was regulating tribal affairs, individual  
23 Indian affairs. So there was a particular --  
24 particularly close nexus, frankly, to -- to the  
25 Indian tribe and -- and tribal members who were

1 going to work for it.

2 So I think -- I think -- other than  
3 that it arose in an unusual situation, where it  
4 was a preference in -- in federal employment, it  
5 was very closely related to the tribe. But I  
6 think, if you -- if you get away from that, it  
7 would be much more difficult to defend if --

8 JUSTICE KAVANAUGH: How about Congress  
9 decides for the -- to help the tribes and tribal  
10 members that it's going to mandate that states  
11 give a preference in college admissions to  
12 American Indians?

13 MR. KNEEDLER: Again, I think that  
14 would -- that would be much more difficult to  
15 defend. I -- I'm not sure what the defense of  
16 it would --

17 JUSTICE KAVANAUGH: And why, though?  
18 I just want to understand. You -- you've had an  
19 instinct to both these questions. That's much  
20 more difficult, but why?

21 MR. KNEEDLER: I -- I think it's  
22 because the -- the relationship to -- the tribal  
23 relationship to the -- tribal relationship is --  
24 is more attenuated and bumps up against  
25 interests that other people might have. I think

1 that that may be an important consideration.

2 But contrast that perhaps to  
3 Congress's long-furnished funds to educate  
4 Indians. In fact, some colleges and  
5 universities have -- have had that as part of  
6 their mission for years, for 200 years.

7 JUSTICE KAVANAUGH: And then --

8 MR. KNEEDLER: That might present  
9 different questions.

10 JUSTICE KAVANAUGH: Okay. And then  
11 you've -- you suggested that everything's been  
12 operating smoothly, you know, we leave well  
13 enough alone, but I just want you to speak to  
14 the concern on the other side, which is, you  
15 know, you come in as an adoptive couple, you  
16 want to adopt a child, the state court otherwise  
17 would say the best interests of the child would  
18 be to go with you, and then you're told no,  
19 you're the wrong race.

20 MR. KNEEDLER: No. I mean, with  
21 respect, what you're told is, if -- if it's one  
22 of the preferences, that there is a tribal  
23 political citizenship aspect to the -- to the  
24 determination. And it -- that's when --

25 JUSTICE KAVANAUGH: Even -- even with

1 the third preference?

2 MR. KNEEDLER: Yes. The -- it has to  
3 -- it has to be a member of -- of another tribe.  
4 It has --

5 JUSTICE KAVANAUGH: Mm-hmm.

6 MR. KNEEDLER: And that means that  
7 there -- that political -- that's a political  
8 relationship as well.

9 Now, whether -- whether there could be  
10 a rational basis challenge to that in a  
11 particular case, we don't have anything like  
12 that here. And -- and the -- I think the core  
13 --

14 JUSTICE KAVANAUGH: And with the --

15 MR. KNEEDLER: -- of the third  
16 preference is where -- is where that tribe --  
17 either it occupies the same reservation or it  
18 has another parent --

19 JUSTICE KAVANAUGH: Well, you say the  
20 core, but it can apply even when it's a  
21 completely different tribe with none of that,  
22 correct?

23 MR. KNEEDLER: But -- but if -- but if  
24 --

25 JUSTICE KAVANAUGH: Is that -- is that



1 a yes?

2 MR. KNEEDLER: It's possible -- I  
3 mean, yes, yes, you would have to look at it.

4 JUSTICE KAVANAUGH: Yeah.

5 MR. KNEEDLER: But the good cause  
6 exception might allow greater flexibility --

7 JUSTICE KAVANAUGH: And I think you  
8 referred --

9 MR. KNEEDLER: -- when the child is --

10 JUSTICE KAVANAUGH: -- I think you  
11 referred earlier to common spiritual practices  
12 that may exist in those circumstances. Does  
13 that suggest that Congress could say that, you  
14 know, Catholic parents should get a preference  
15 --

16 MR. KNEEDLER: No. No, not -- not at  
17 all.

18 JUSTICE KAVANAUGH: And why not?

19 MR. KNEEDLER: Not at all.

20 JUSTICE KAVANAUGH: Why not?

21 MR. KNEEDLER: No. No --

22 JUSTICE KAVANAUGH: You said spiritual  
23 preferences.

24 MR. KNEEDLER: Yes.

25 JUSTICE KAVANAUGH: Yeah.

1           MR. KNEEDLER: And all I meant to say  
2 by that was Congress made a judgment that there  
3 are common cultural characteristics among tribes  
4 or it had that -- it had that judgment or at  
5 least that the preferences it set up allow for  
6 taking that into account because it's extended  
7 family, it's extended kin, another tribe with  
8 cultural similarities.

9           And so I -- tribal members, I mean, it  
10 varies. Obviously, not all members are alike,  
11 but some people -- some tribal members feel a  
12 very strong affinity for their tribe in terms of  
13 their heritage going back to before the founding  
14 of this country. It's an important part of  
15 their cultural stability, their kinship, and --  
16 and stability in growing up.

17           JUSTICE KAVANAUGH: Yeah.

18           MR. KNEEDLER: And if you have a young  
19 child --

20           JUSTICE KAVANAUGH: You have -- you  
21 have strong interests, and I respect those, on  
22 one side. I'm just trying to say there are --  
23 there are strong interests on the other side  
24 too, which is why the case is hard, but I'll  
25 finish there. Thank you.

1 MR. KNEEDLER: Okay.

2 JUSTICE BARRETT: Mr. Kneedler, I want  
3 to pick up where Justice Kavanaugh left off.  
4 You -- you said that it would be a harder case  
5 in some of the hypotheticals that Justice  
6 Kavanaugh presented, say, you know, Treasury  
7 instead of the BIA, a preference in employment.

8 Is that because you would say -- you  
9 know, I think that the classifications for  
10 Indians are difficult because it's difficult --  
11 there's a racial component and the political  
12 identity component.

13 MR. KNEEDLER: Right.

14 JUSTICE BARRETT: Are you struggling  
15 with those hypotheticals -- or, sorry, I don't  
16 mean to say struggling. Are you finding those  
17 more difficult to answer because you would say  
18 that there are some circumstances in which the  
19 classification of Indian operates more like a  
20 racial classification because it is unconnected  
21 to tribal sovereignty?

22 MR. KNEEDLER: Yes.

23 JUSTICE BARRETT: For the BIA, for  
24 example, you know, you can see the connection  
25 between the classification and tribal

1 sovereignty, and so it's easier to say that  
2 that's a political classification subject to  
3 rational basis scrutiny. If you move farther  
4 away from that, if you're talking about  
5 Treasury, then would you say that it operates as  
6 a -- as a political classification but doesn't  
7 satisfy rational basis scrutiny, or would you  
8 say it's a racial classification and fails  
9 strict scrutiny?

10 MR. KNEEDLER: I -- you could think  
11 about it either way. I think it's still -- I  
12 think it's still a political classification but  
13 -- but perhaps an unreasonable one because there  
14 -- there -- there is, as the Court's cases that  
15 have looked at this, Holliday and others, there  
16 is, I think, at some point a proportionality  
17 aspect to it. Would -- would other people in  
18 the society be -- be greatly adversely affected  
19 or something -- something like that.

20 But, on the equal protection side, I  
21 think Adarand is a very good example of that  
22 because there was a -- a preference for  
23 contracting within a series of black, Asian,  
24 white -- you know, other minority groups. It  
25 was expressed in racial terms, and the Court

1 said that was subject to strict scrutiny.

2 But that's -- that's why it's  
3 important to look at the context in which  
4 Congress is acting. And because Congress --  
5 Congress doesn't make sweeping judgments in this  
6 area. It looks at --

7 JUSTICE BARRETT: But just --

8 MR. KNEEDLER: -- the practical  
9 problem.

10 JUSTICE BARRETT: -- just to clarify  
11 to make sure I understand your position,  
12 sometimes the classification can operate as  
13 racial and sometimes it would be political,  
14 depending on the context in which Congress is --

15 MR. KNEEDLER: I think if it's  
16 expressly based on tribal citizenship here,  
17 either the child or the parent where the child  
18 is not --

19 JUSTICE BARRETT: I'm not talking  
20 about ICWA. I'm talking about some of Justice  
21 Kavanaugh's hypotheticals.

22 MR. KNEEDLER: What I'm saying, if it  
23 turns on tribal membership or tribal  
24 citizenship, then I think it is political in its  
25 -- in its essence. Whether it goes too far in

1 giving a benefit to a -- a -- a -- someone with  
2 that political connection --

3 JUSTICE BARRETT: Okay.

4 MR. KNEEDLER: -- I think would be the  
5 first -- the first way to look at it. Otherwise  
6 there could be certainly --

7 JUSTICE BARRETT: Well, I'll -- I'll  
8 move on.

9 MR. KNEEDLER: -- challenges to many  
10 things.

11 JUSTICE BARRETT: I'll move on. It  
12 just seems to me that it is always going to be  
13 tied to tribal membership in some way. But I'll  
14 move on, just very quickly I am going to  
15 summarize what I understand you to be saying  
16 about the Article I issue, and I just want you  
17 to tell me if I have got it right or correct me  
18 if I don't.

19 In response to Justice Alito's  
20 questions, in particular, and some of Justice  
21 Kagan's questions as well, you were saying  
22 plenary is plenary. So you would say that  
23 Congress's power to regulate Indian affairs is  
24 plenary so as long as it's rationale or, you  
25 know, reasonably related or whatever standard we

1 want to use, it's within Congress's power and  
2 the only limitation is if it bumps up against  
3 some external limit, like the equal protection  
4 clause or like sovereign immunity --

5 MR. KNEEDLER: No, I -- I -- I think  
6 -- I think there are -- I think there are  
7 built-in restraints like if it -- if it -- if  
8 what it's doing is disproportionate, perhaps. I  
9 mean, it's hard to articulate this because this  
10 Court has never struck down a statute of that  
11 sort.

12 And with respect to the Adarand case,  
13 there's no express -- there was no express  
14 reference for supposition about tribal  
15 membership there. And so it was easy to  
16 identify it as --

17 JUSTICE BARRETT: Okay. But -- but --  
18 but on my Article I question.

19 MR. KNEEDLER: No, on the -- on the  
20 Article I question, I think plenary at its core  
21 means there are no --

22 JUSTICE BARRETT: No --

23 MR. KNEEDLER: -- subject matters  
24 geographic areas categorically beyond its power.

25 JUSTICE BARRETT: But external limits

1 from the Constitution would apply, like equal  
2 protection or in Seminole Tribe, state sovereign  
3 immunity.

4 MR. KNEEDLER: Yes, they would apply.  
5 And this -- I just want to reiterate this  
6 doesn't just come from the Indian Commerce  
7 Clause.

8 JUSTICE BARRETT: Right.

9 MR. KNEEDLER: There is the inherent  
10 power that comes from Congress's --

11 JUSTICE BARRETT: -- trust  
12 relationships?

13 MR. KNEEDLER: -- the federal  
14 government, which in turn comes from  
15 constitutional powers, likes the war power and  
16 all of that that renders the tribes dependent  
17 and, therefore, in need of protection.

18 And so I think it's very hard for this  
19 Court to lay down a standard rule about what's  
20 necessary to protect the tribes and to fulfill  
21 the obligation to the Indians.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Jackson?

24 JUSTICE JACKSON: Yes. So I -- I  
25 agree to some extent with Justice Kavanaugh that



1 there are strong interests on both sides of  
2 these issues. What I'm mostly concerned about  
3 is that we might be taking it upon ourselves to  
4 weigh those interests, where really our role  
5 should be thinking about what the framers  
6 intended with respect to the scope of Congress's  
7 authority as it regards Indian affairs and what  
8 Congress believed was necessary to protect  
9 Indians, given that exercise of authority.

10 So I guess I'm -- that makes me wonder  
11 whether we shouldn't be giving more weight to  
12 the statements in the legislative history from  
13 Congress in terms of its decision that ICWA and  
14 its provisions were, in fact, related to tribal  
15 sovereignty necessary to preserve tribal  
16 sovereignty. So let me just ask you how -- how  
17 much weight, if any, should we be giving to  
18 clear, direct statements from Congress that this  
19 was being done pursuant to its understanding of  
20 its plenary authority as given it -- given to it  
21 in the Constitution and that it was necessary  
22 from Congress's perspective to solve for the  
23 problem of these state welfare practices that  
24 were causing harm to Indian children, given its  
25 responsibility as a trust relationship for

1 Indian affairs?

2 MR. KNEEDLER: I think very, very  
3 great deference. And I think that is the  
4 message of cases like Holliday and Perrin and  
5 cases like that. And you don't have to look to  
6 legislative history for that. It's set out in  
7 the -- it's set out in the beginning of ICWA  
8 itself.

9 It starts by saying clause 3 of  
10 Article I provides that Congress shall have the  
11 power to regulate commerce with Indians, and  
12 through this and other authority it has plenary  
13 power. And Congress is saying that, through  
14 statutes, treaties, et cetera, and -- and the  
15 course of dealing with tribes, it has assumed --  
16 assumed the responsibility for the protection of  
17 Indians. Those are in 1901.

18 1902 says the Congress hereby declares  
19 that it is the policy of this nation to protect  
20 the best interests of Indian children by  
21 establishing minimum standards in state child  
22 welfare proceedings because that was the problem  
23 they were addressing.

24 Yes, the boarding school issue was  
25 also out there, but Congress saw, again, in the

1 considered focused way that it deals with  
2 problems, it saw a major problem. It thought  
3 that this was in the best interests, that the  
4 standards and the protections and the framework  
5 it set out were in the best interests of the  
6 child.

7           And if that displaces ordinary child  
8 welfare law in particular cases, Congress made a  
9 judgment that the objective factors it set out,  
10 which take into account extended family and  
11 kinship principles, that family law has, but the  
12 way this statute implements them in state  
13 proceedings is in the best interests of Indian  
14 children and that judgment by Congress based on  
15 extensive hearings was entitled to great  
16 deference.

17           CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19           ORAL ARGUMENT OF IAN H. GERSHENGORN  
20           ON BEHALF OF THE TRIBAL PARTIES

21           MR. GERSHENGORN: Mr. Chief Justice  
22 and may it please the Court:

23           Congress enacted ICWA because Indian  
24 children were being torn from their families and  
25 tribes through the operation of state family law

1 in state courts. I want to emphasize three  
2 points at the start.

3 First, there is no -- Congress has  
4 plenary power over Indians and there is no  
5 exception in that power for state court child  
6 custody proceedings. Since the founding, the  
7 health and safety of Indian children has been  
8 the province of the federal government and  
9 tribes, not the states.

10 And, indeed, when Congress attempted  
11 to give states authority over Indian children in  
12 the 20th century, states resisted and said it  
13 was an exclusive federal responsibility.

14 Second, Plaintiff's equal protection  
15 claims should be rejected. A facial challenge  
16 in a case without standing is just about the  
17 worst way to consider the constitutionality of a  
18 major federal statute. And, in any event, ICWA  
19 draws distinctions that are political three  
20 times over; it applies only to tribes that the  
21 federal government has recognized, it  
22 incorporates membership criteria established by  
23 sovereign tribes, and it relies on the political  
24 decisions of parents to remain tribal members.

25 Third, ICWA protects the best

1 interests of children. It adopts a system of  
2 structured decisionmaking that combines  
3 evidence-based presumptions with flexibility to  
4 make individualized determinations. It protects  
5 child -- child safety, facilitates access to  
6 critical remedial services to keep families  
7 intact, and it keeps -- works to keep families  
8 -- keep children with their families and  
9 communities. That's why ICWA is viewed as the  
10 gold standard.

11 I'd be happy to take the Court's  
12 questions. If not, I will start with -- with  
13 the -- I will take the Court's questions.

14 (Laughter.)

15 MR. GERSHENGORN: But I'm also happy  
16 to keep going.

17 CHIEF JUSTICE ROBERTS: Not that easy.

18 Do you think that ICWA incorporates  
19 the familiar best interest of the child inquiry  
20 that are -- are applied in family courts  
21 throughout the country?

22 MR. GERSHENGORN: So I think I would  
23 have to say the answer to that is no. What ICWA  
24 does is modify that because Congress made the  
25 judgment that the best interest standard was

1 being implied in a way that resulted in  
2 unwarranted removals.

3           What Congress did was create a system  
4 it thought was in the best interests of the  
5 child, but not by adopting the "state best  
6 interests of the child standard" because it  
7 found that that was being applied in a  
8 discriminatory way.

9           Now, so, Your Honor, there's been a  
10 lot of back and forth about good cause. And it  
11 seems good cause is important in the statute.

12           I will say candidly, having looked at  
13 the cases, there are three -- the -- the state  
14 courts are in a little bit of disarray as to  
15 whether the preferences are sort of binding,  
16 whether there's a straight free -- free-floating  
17 best interest standard that sort of -- that  
18 works through good cause or whether, as I think  
19 is probably the way Congress intended it, that  
20 there's a -- the placements are the default  
21 setting and good cause provides a -- a way to  
22 rebut the presumption.

23           Now, Interior has explained how good  
24 cause works. It involves you can take into  
25 account the decisions of the -- the views of the

1 parents, the views of the child, if the child is  
2 old enough to express them. You can take into  
3 account sibling attachment. You can take into  
4 account bonding with foster parents, as long as  
5 it was not done illegally through ICWA. The  
6 thing you cannot take into account is  
7 socioeconomic status.

8           So what the Casey brief and others say  
9 and what -- the reason why medical professionals  
10 are here, states are here, family rights  
11 advocates are here is because ICWA is the gold  
12 standard. It adopts that -- those  
13 evidence-based presumptions and allows for  
14 flexibility to protect the best interests of the  
15 child.

16           So, with respect to sort of the power  
17 debate which has been going on, I want to make a  
18 couple of points. First, this is at the core of  
19 the plenary power doctrine. From the beginning,  
20 the -- the plenary power doctrine was used to  
21 protect Indians from non-Indians. There is no  
22 doubt that if states had moved in and done a  
23 wholesale physical removal of Indian children,  
24 that would have been within the duty of  
25 protection. The fact that this is being done

1 through state courts, through state family law,  
2 doesn't deprive Congress of power.

3 Justice Barrett, you were asking about  
4 limits. Obviously, when we're talking about  
5 plenary power, limits are hard to find, but I  
6 will say this Court has identified some. What I  
7 would say is, when Congress acts directly on  
8 Indians, the limits on plenary power, as opposed  
9 to the other provisions, are hard to find, but  
10 what Congress said in Perrin was that when  
11 Congress acts on non-Indians to protect Indians,  
12 then there may be limits.

13 And, in that case, it was the question  
14 of banning alcohol sales outside of  
15 reservations. And what Congress said -- what  
16 the Court said was that if you're doing it in  
17 counties where there are a lot of Indians,  
18 probably okay. If you're doing it statewide  
19 when Indians are concentrated in a -- a number  
20 of counties, not okay. And so that's a limit  
21 that this Court has identified.

22 The limit that does not exist is the  
23 one that's tied to land. I already addressed  
24 the limit for state custody proceedings, which,  
25 you know, Congress has acted for servicemen to



1 say deployment is not something you can take  
2 into -- it cannot be dispositive in a best  
3 interest finding, right. Congress has acted  
4 pursuant to other federal powers to do exactly  
5 what it did in ICWA.

6 The -- the rule that makes no sense is  
7 land. Why does it make no sense? From the  
8 beginning, Congress has -- from the 17 -- from  
9 the Trade and Intercourse Act forward, Congress  
10 has legislated off-reservation. It -- it  
11 prohibited in the 1834 Act in Section 15  
12 alienating the confidence of Indians. In the  
13 earlier acts, it -- it required non-Indians to  
14 report Indian invasions to the federal  
15 government. It prohibited land sales by Indians  
16 on and off the reservation. In the liquor sale  
17 context, what this Court said in McGowan was  
18 Congress has the authority to legislate wherever  
19 Indians may be. In Holliday, Forty-Three  
20 Gallons, Perrin, all those cases are off  
21 reservation. In the treaty cases, this Court  
22 has seen in Fishing Vessel, in Cougar Den,  
23 right, those were off reservation. And then  
24 Indian Health Care Improvement Act, the Indian  
25 Housing -- Native American Housing Assistance

1 Program, the Indian Education Program, all of  
2 those are off reservation.

3 Why does land make no sense? Land  
4 makes no sense because, in the Articles of  
5 Confederation, there was a land carveout. It  
6 was exactly the kind of reason that we had the  
7 change in the Constitution to prevent that.

8 Why does land make no sense? There  
9 are landless tribes, right? There are landless  
10 tribes in California and Montana. Land is just  
11 not a sensible way to divide and limit  
12 congressional power.

13 JUSTICE ALITO: There were --

14 JUSTICE KAVANAUGH: What --

15 JUSTICE ALITO: -- several questions  
16 --

17 JUSTICE KAVANAUGH: Go ahead.

18 JUSTICE ALITO: There were several  
19 questions earlier about the justification for  
20 granting preference for foster or adoptive  
21 parents who are members of an entirely different  
22 tribe. Could you speak to that?

23 MR. GERSHENGORN: Certainly, Your  
24 Honor.

25 JUSTICE ALITO: Is that -- is that

1 based on -- on -- on the assumption that all  
2 tribes are fungible --

3 MR. GERSHENGORN: No, Your Honor.

4 JUSTICE ALITO: -- or sufficiently  
5 similar to justify that?

6 MR. GERSHENGORN: No, Your Honor.

7 JUSTICE ALITO: What is it based on?

8 MR. GERSHENGORN: It is based on the  
9 view that -- that -- that all federally  
10 recognized -- all federally recognized tribes  
11 and members of those tribes share a common  
12 political relationship with the United States.  
13 That's what renders it political rather than  
14 racial. Every member of a federally recognized  
15 tribe shares that political relationship.

16 Now that then begs the question that a  
17 number of the Justices have focused on about, is  
18 it rational? That's a fair question, and that's  
19 a fair debate.

20 Let me explain why I think it clearly  
21 is rational. And some of this Mr. Kneedler  
22 touched on and I agree with. It has a clearly  
23 -- remember, we're talking about a -- a  
24 preference -- a prong that was never applied to  
25 any of the -- of the plaintiffs here. And on a

1 facial challenge, right? All I -- all it has to  
2 have is a plainly legitimate scope, which it  
3 does.

4 In Alaska, for example, it is quite  
5 common for Indian members of one tribe to live  
6 on the reservation of another. The preference  
7 applies quite often there, right? What the --  
8 what your Court -- what the Court has been  
9 worrying about is this kind of Maine to Arizona  
10 hypo, right, that we identify some tribe in  
11 Maine that's going to somehow get a preference.

12 Well, that case has never happened  
13 that we have been able to find and able counsel  
14 on the other side has been able to find, and I  
15 would submit on a facial challenge in a  
16 situation where it's never applied that it would  
17 be very odd to strike down a congressional  
18 statute.

19 I will say, though, that I -- for the  
20 reasons I've said, I think it's -- it is  
21 actually quite rational. If the Court  
22 disagreed, it's also clearly severable. If I  
23 give a -- if I say I would like, you know,  
24 Italian food, Chinese food at any steak joint,  
25 and it turns out there's a vegan in the group,

1 that I can't do the steak joint, the first two  
2 preferences remain, okay? There's no --

3 JUSTICE ALITO: But why is it  
4 rational? I understand that it's a facial  
5 challenge, but why -- why is it rational?  
6 Before the arrival of Europeans, the tribes were  
7 at war with each other often, and they were  
8 separated by an entire continent. And I -- I  
9 don't know how many cultural similarities you  
10 would identify if you compared a tribe in  
11 Florida with a tribe in Alaska.

12 MR. GERSHENGORN: So, Your Honor, I  
13 think it's been pretty clear I am not basing  
14 this on cultural similarity. I'm basing it on a  
15 political relationship with the United States  
16 that all the tribes share.

17 Now I take Your Honor's point. If we  
18 had a case -- and this is why you wait for --  
19 for actual -- for actual as-applied challenges  
20 as opposed to facial challenges. If we had a  
21 case where a family was denied because a tribe  
22 in Maine with no ties to the child was given  
23 preference over a Cherokee or a Navajo Indian,  
24 we would be talking about a pretty serious -- a  
25 pretty serious as-applied challenge.

1           But, of course, we're -- we're a  
2 million miles from that. We're the exact  
3 opposite. What you're hearing and what the --  
4 what is actually happening on the ground is this  
5 is used in situations which are quite  
6 unremarkable, as I say, when a member of one  
7 tribe is living on the reservation of another,  
8 has built exactly the kind of community that  
9 ICWA is hoping to preserve.

10           So, you know, from -- from my  
11 perspective, I certainly am not here to defend  
12 the -- what I'll call the Maine to Arizona hypo.  
13 But I -- what I am here to say is it has a  
14 plainly legitimate sweep; it is political, not  
15 racial; and that -- that -- that even if Your  
16 Honors disagree with that, it's also plainly  
17 severable.

18           CHIEF JUSTICE ROBERTS: Counsel, on  
19 the political and racial point, I'd like to  
20 return to the dialogue between Justice Barrett  
21 and Mr. Kneedler, which, if I understand it,  
22 raised a question, because there are several  
23 hypotheticals where Mr. Kneedler, I think,  
24 properly recognized that that would present a  
25 harder case.

1           And I think the suggestion was, well,  
2           is it a harder case because the racial aspect of  
3           what is a combined, in most cases anyway,  
4           combined polity and blood characterization, in  
5           that case, that the racial aspect predominates  
6           in some particular way.

7           MR. GERSHENGORN: Right.

8           CHIEF JUSTICE ROBERTS: Did that seem  
9           to resonate with you?

10          MR. GERSHENGORN: No, Your Honor.  
11          You'd be perhaps unsurprised -- no. The way I  
12          would view it is -- and this was, I think, one  
13          of the ways Justice Barrett framed it, which is  
14          how I think about it, which is that's a  
15          political characterization. If we're basing --  
16          if -- if Congress is making a judgment on  
17          federally recognized tribes, remember, that's  
18          excluding people who have left the tribe.  
19          That's excluding state-recognized tribes.

20          CHIEF JUSTICE ROBERTS: So your answer  
21          --

22          MR. GERSHENGORN: But -- but could I  
23          finish? Because I -- I want to respond directly  
24          to your question. I'm not finishing on a -- on  
25          a tangent. Directly to your question.

1 (Laughter.)

2 MR. GERSHENGORN: It is a political  
3 justification, but it has to meet the Mancari  
4 standard, special treatment tied rationally to  
5 the fulfillment of Congress's unique obligations  
6 to the Indians. What does that mean?

7 Well, I think what it means is that a  
8 bare desire to help individual Indians doesn't  
9 satisfy it. That's what Mancari suggests,  
10 right? Mancari says you can't just give a  
11 preference to any Indian, even a federally -- a  
12 member of a federally recognized tribe,  
13 throughout the government. A bare desire to --  
14 to help is not enough.

15 You know, we could go -- I don't want  
16 to parse agency by agency. I think DOJ, which  
17 does all the litigation for the government and  
18 Indian tribes, probably is a situation where you  
19 could justify a preference.

20 But the main point, Your Honor, is  
21 that Mancari has some bite, right? Mancari says  
22 you can't just decide you're going to help any  
23 individual Indians and then, you know, close the  
24 book.

25 CHIEF JUSTICE ROBERTS: All right. So



1 you disagree with Mr. Kneedler, who did say that  
2 in those variety of cases, that they would  
3 present a harder -- a harder case?

4 MR. GERSHENGORN: I'm not saying I  
5 disagree that it's a harder case. I'm just  
6 saying I view them as political.

7 CHIEF JUSTICE ROBERTS: You'd win it  
8 just because of --

9 MR. GERSHENGORN: No.

10 CHIEF JUSTICE ROBERTS: -- despite the  
11 fact --

12 MR. GERSHENGORN: Well, I'd have to  
13 hear the particular hypos, Your Honor, but let  
14 me -- I want to be clear about the method of  
15 analysis, and then I'm happy to answer whatever  
16 hypos Your Honor wants.

17 The -- the -- my method of analysis  
18 is, if the federal government imposes it on  
19 federally recognized tribes, it's political. It  
20 then has to meet the test that was set forth in  
21 Mancari. It has -- the reason -- justification  
22 has to be tied rationally to the fulfillment of  
23 Congress's unique obligations to the Indians.

24 Some of those, you know, Mancari said  
25 BIA, okay; federal government-wide, not okay.

1 And, you know, then I need to see what Congress  
2 said. What makes this case so easy, right, is  
3 Congress studied this for four years, right?  
4 Congress told you exactly why, not in  
5 legislative history, but in legislative findings  
6 that it said this is what we're worried about,  
7 right?

8           We -- this is -- this is going to the  
9 -- this is not a peripheral mere desire to  
10 benefit individual Indians. This is going to  
11 the core of tribal self-government.

12           JUSTICE ALITO: What about the  
13 hypothetical about providing COVID vaccines?  
14 And suppose Congress says Indians -- the Indian  
15 population on the whole has more people with  
16 complications -- with -- with factors that make  
17 them more vulnerable to serious consequences  
18 from getting COVID, and, therefore, they should  
19 get preference over others in the -- in the  
20 distribution of vaccines.

21           MR. GERSHENGORN: So, Your Honor, the  
22 way you have posed the hypo, I would consider  
23 that a racial classification, not a political  
24 one. If Congress were to say just Indians  
25 undefined, that might well be a -- a racial

1 classification, might well be.

2           If Congress were to say we're giving  
3 it to members of federally-recognized Indian  
4 tribes first because we find on reservations  
5 where the individuals are concentrated that  
6 there's a particular problem, because they don't  
7 have access to healthcare and hospitals in -- in  
8 the same way, then I think that would be  
9 defensible. That would be applicable --

10           JUSTICE ALITO: All right. Well, let  
11 me modify it. It applies to members of  
12 federally-recognized tribes but it not -- it's  
13 not limited to what happens on the reservation.  
14 It's everywhere.

15           MR. GERSHENGORN: So I think that -- I  
16 think that would be harder. And it goes back to  
17 the bare, bare desire, that would be a political  
18 classification, but the bare desire to help  
19 members of tribes is not, we think, is not --  
20 forget what we think -- is not what the Court  
21 has said is sufficient under Mancari.

22           And so, you know, I think that -- that  
23 that's how I -- that's how I think about it.  
24 You know, look, any of the hypos could have hard  
25 questions. I've tried to give the Court a sense

1 of what I think this Court's cases demand, and,  
2 therefore, how we think about it.

3 JUSTICE SOTOMAYOR: I -- I'd like you  
4 to finish that.

5 MR. GERSHENGORN: No, I'm done.

6 JUSTICE SOTOMAYOR: You say helping  
7 Indians is not enough. But what's the helping  
8 Indians plus what?

9 MR. GERSHENGORN: So I think some  
10 link, Your Honor, to tribal self-government is  
11 sort of at the core. And that's why I think  
12 ICWA is really so easy, because what -- what  
13 makes -- Congress made the findings, and -- and  
14 a number of the Justices have touched on it this  
15 morning -- Congress made the findings that the  
16 wholesale unwarranted removal of 25 to  
17 35 percent of Indian children was devastating  
18 tribes and tribal self-government.

19 There is nothing more core -- this is  
20 a place where I disagree quite strongly with my  
21 friends on the other side -- like there is  
22 nothing more central to self-government than  
23 deciding who --

24 JUSTICE SOTOMAYOR: So how --

25 MR. GERSHENGORN: -- is -- who's a

1 member.

2 JUSTICE SOTOMAYOR: -- how does --

3 MR. GERSHENGORN: And you don't have  
4 -- to take my word for it. That's what Congress  
5 said.

6 JUSTICE SOTOMAYOR: -- how does  
7 healthcare, the education, the housing  
8 allotments, how do they fit in?

9 MR. GERSHENGORN: I -- I think the --

10 JUSTICE SOTOMAYOR: Those are the  
11 other Title 25.

12 MR. GERSHENGORN: Yeah, I think that  
13 those are -- that shows, Your Honor, a -- a  
14 number of things.

15 First of all, it shows that Congress  
16 has routinely -- there's not, you know, there's  
17 this sense, I think, that Mancari sprung up  
18 from, you know, from the earth, you know, 40  
19 years ago.

20 And -- but what -- what -- Congress  
21 has been legislating to help Indians since the  
22 beginning, right, it is in the Constitution, and  
23 it is there not just -- I'm not using that as  
24 sort of an, aha, it's in the Constitution. It's  
25 in the Constitution because tribes are --

1 Indians are treated in the Constitution like  
2 political entities. Right?

3 Congress -- they're treated parallel  
4 in the -- in the -- in the -- in the Commerce  
5 Clause with foreign nations and with states.  
6 There -- Congress has the power to treat -- to  
7 conduct treaties with Indians. Right?

8 They are -- they are political from  
9 the beginning and, like, I mean, I don't want to  
10 list all of the Indian-specific statutes, right,  
11 but the Dawes Act, the Indian Civil Rights Act,  
12 the Indian Reorganization Act, you know, ICWA,  
13 IGRA, I mean, Congress has routinely singled out  
14 members of federally-recognized tribes for  
15 legislation.

16 JUSTICE KAGAN: Mr. Gershengorn, I  
17 want to go back to something you said, because  
18 you said it, you know, it's obvious that when  
19 you remove 30 percent of children from a  
20 political community, you harm that political  
21 community.

22 I think some of the strong feelings  
23 about this case come from a sense of, yes, but  
24 what about the children? I mean, you do harm  
25 the political community, but are you saying that

1 the political community is more important than  
2 the welfare of the children? And -- and -- and  
3 -- and so that's the thing that I think people  
4 are going, whoa.

5 MR. GERSHENGORN: Yeah.

6 JUSTICE KAGAN: I mean, so --

7 MR. GERSHENGORN: I -- I'm glad you  
8 asked that, Your Honor. I think it's critical  
9 that what Congress found is not just that ICWA  
10 was -- was important for preserving the tribal  
11 community. Congress found that ICWA was in the  
12 best interests of the children. Right?

13 I -- I don't think I could emphasize  
14 it more than -- than that. What Congress found  
15 was that it was -- it was in the interest of the  
16 children. And the reason that Congress found  
17 that is because -- and the reason ICWA has  
18 become the gold standard, is because Congress  
19 made the judgment and recognized that separating  
20 children from their families and communities too  
21 soon caused harm.

22 I -- I think it's important to  
23 recognize that the average age of people in ICWA  
24 is over six-years-old. This is discussed in the  
25 Casey brief. These are children who have formed

1 school mates, school bonds. They are children  
2 who are playing on sports teams. They are  
3 children who have interacted, have a group of  
4 friends. They've been -- made connections on  
5 the community.

6 And what ICWA realizes is that these  
7 children were being taken from their communities  
8 too soon. Why? Well, sometimes there was abuse  
9 at home. Right? But what ICWA says is a lot of  
10 times that is remediateable, which is why we had  
11 the active efforts provision. Right?

12 It's substance abuse. Right? It's --  
13 it's the ability, if you can get the child out  
14 of the home, get the care to the parents, then  
15 the child will actually thrive when the child is  
16 returned to the home and community.

17 CHIEF JUSTICE ROBERTS: What --

18 MR. GERSHENGORN: So I --

19 CHIEF JUSTICE ROBERTS: -- what --  
20 what about the third preference, which is  
21 preference for members of another tribe, how  
22 does that have to do with keeping the Indian  
23 child on the reservation?

24 MR. GERSHENGORN: So, Your Honor, as I  
25 suggested the --



1 CHIEF JUSTICE ROBERTS: With the --  
2 with the familiar environment as you suggested.

3 MR. GERSHENGORN: Sure. And -- and  
4 the -- the -- the -- the quickest answer to  
5 that, Your Honor, is that -- that in my  
6 experience, or I should say my experience  
7 talking with people who actually experienced  
8 this, which is -- is as close as I've gotten, is  
9 that the way this comes up most often actually  
10 is tribes -- is individual Indians living on the  
11 -- on the reservation of another.

12 And so they are building exactly that  
13 community. This is not some random tribe  
14 plucked from the ether that all of a sudden gets  
15 a preference in the real world.

16 CHIEF JUSTICE ROBERTS: Well, there's  
17 no limitation of that.

18 MR. GERSHENGORN: Absolutely, Your  
19 Honor. And I am not here to say -- in fact, I  
20 think I have conceded -- that it would be an  
21 extraordinarily difficult as-applied challenge  
22 in the kinds of, again, I'm using as a shorthand  
23 the Maine to Arizona hypo, but I don't think  
24 this is at all difficult on a facial challenge  
25 in the real world where this plays out.

1           Because what's happening in the real  
2 world, remember, we're -- we're talking about  
3 not a single example of this appears in any of  
4 the briefing that I have seen. Okay?

5           And so what's happening in the real  
6 world is that individuals are -- are --  
7 individual members are living on the  
8 reservations of another and -- and then the  
9 preference is going to that tribe.

10           CHIEF JUSTICE ROBERTS: Justice  
11 Thomas?

12           Justice Alito?

13           Justice Sotomayor?

14           JUSTICE KAGAN: You, in your opening  
15 statement, you said that this is a bad case to  
16 deal with this question because the individual  
17 plaintiffs don't have standing.

18           Why not?

19           MR. GERSHENGORN: Your Honor, thank  
20 you. So they don't have standing for a number  
21 of reasons. First, redressability. Right?

22           This is a law review article. It does  
23 not bind a single state court judge that  
24 actually adjudicates a -- a -- a -- a -- a state  
25 court adoption proceeding.

1           Second, there is no injury in fact.  
2           There is not a single individual plaintiff who  
3           has had an adoption that existed from the time  
4           of the amended complaint through the Fifth  
5           Circuit judgment. And so there is no injury in  
6           fact.

7           And, third, there has been some  
8           suggestion that the APA, the challenge to the  
9           APA, regs under the APA might save the equal  
10          protection challenge. That is incorrect.

11          The injury to the Plaintiffs is coming  
12          from the preferences in the statute. There is  
13          nothing about the challenge to the regs that  
14          eliminates the preferences in the statute or the  
15          definition of Indian child. And so there is no  
16          standing on the equal protection side for --

17          JUSTICE KAGAN: Does it make a  
18          difference that our ruling would bind state  
19          officials?

20          MR. GERSHENGORN: Absolutely not, Your  
21          Honor. The -- the Court has been crystal clear  
22          that standing needs -- that standing needs to be  
23          established in the lower court.

24          Every case would have standing. There  
25          would be no advisory opinions because, of

1 course, what this Court says binds everybody.

2 And so the fact that -- that it's made  
3 it this far for an erroneous standing ruling  
4 does not cure the -- the standing problem that  
5 existed at the start.

6 And then I will say, although Your  
7 Honor asked me about individuals, Texas has no  
8 equal protection rights here. Texas goes on and  
9 on, we heard all the numbers this morning about  
10 their injury. That's nice, but injury does not  
11 create an equal protection right.

12 And basically what Texas's view would  
13 do is completely eviscerate third-party  
14 standing. Georgia v. McCollum could have been a  
15 very short opinion. It could have just said  
16 Texas is participating in an unconstitutional  
17 scheme, thank you very much, but it didn't to  
18 that.

19 It looked to see whether there were  
20 third-party rights that Georgia could assert  
21 that for some reason the third-party was  
22 unlikely to assert.

23 And but regardless of whether teenage  
24 drinkers or excluded jurors have a disincentive  
25 to -- to bring court cases, that has no

1 application to the situation here where the  
2 individual plaintiffs are in court litigating.

3           So there is no justification for Texas  
4 to assert rights. And obviously the *parens*  
5 *patriae* is not available against the federal  
6 government. So there is no standing, in  
7 addition to the fact that the preferences that  
8 have most troubled, for example, Justice  
9 Kavanaugh and Justice Barrett, they were never  
10 applied to any -- like, it's like standing on  
11 standing on standing problems. It's like an  
12 inverse of turtles all the way down. It's like  
13 the absence of turtles anywhere.

14           I need a better metaphor.

15           JUSTICE KAGAN: Thank you.

16           CHIEF JUSTICE ROBERTS: Justice  
17 Gorsuch?

18           JUSTICE GORSUCH: You haven't had a  
19 chance to address the commandeering arguments in  
20 particular with respect to the active efforts  
21 provision.

22           MR. GERSHENGORN: So the active  
23 efforts provision, I think I would say two  
24 things on that.

25           First of all, the main point from our

1 perspective is that, and this is at Footnote 44  
2 of -- Footnote 54 on page 85 of our brief, is  
3 that it applies even, evenhandedly to -- this  
4 does not single out Texas or does not single out  
5 states for particular treatment. It applies  
6 just as much in private placements and that's  
7 set forth in the brief.

8 I also think that it is -- it is right  
9 to view this as a situation in which a private  
10 right is created. You have the -- the  
11 individual Indian child. The tribe has a right  
12 to -- you know, to -- to have the placement done  
13 only after active efforts are -- you know,  
14 active efforts are done.

15 And so I -- I think that with respect  
16 to the active efforts provisions, under this  
17 Court's case law, a provision that applies  
18 even-handedly to private parties and to states  
19 and creates private rights is -- is not  
20 commandeering -- not impermissible  
21 commandeering.

22 JUSTICE GORSUCH: I think we heard  
23 from Texas that it disproportionately affects  
24 them because most of these are initiated by  
25 state entities and also that they'd have to do

1 some work, even in the event of a  
2 private-initiated suit.

3 MR. GERSHENGORN: Yeah, I think, Your  
4 Honor, that way madness lies. If this Court is  
5 going to evaluate even-handed restrictions to  
6 see whether, on balance, they affect more states  
7 than private parties, we've really extended  
8 the -- you know, the anti-commandeering doctrine  
9 and I think the -- this Court's caseload quite  
10 substantially because, you know, what the -- you  
11 know, it's one thing to say -- you know, not to  
12 mention cases like *Reno v. Condon*. I mean, once  
13 you start to say, yes, it regulates  
14 even-handedly, yes, in the real world, there are  
15 private and state parties at issue, but we're  
16 going to look to it and say it more often  
17 affects, you know, states -- and I think *Reno v.*  
18 *Condon* is sort of against that. I think that  
19 was one where the state may have been more  
20 affected. But, in any event, I don't think that  
21 that's a sensible line that this Court could  
22 ever draw to look at, statute by statute, in the  
23 real world, does this affect states more than  
24 private citizens.

25 JUSTICE GORSUCH: Is there any

1 inhibition to a private party raising an  
2 as-applied equal protection challenge to the  
3 third preference in state court litigation?

4 MR. GERSHENGORN: Absolutely not.

5 JUSTICE GORSUCH: And it hasn't  
6 happened in 40 years that you're aware of?

7 MR. GERSHENGORN: I'll just say it has  
8 not been brought to our attention either as  
9 we've done our research or the other side. As  
10 Your Honor knows, recordkeeping in family law  
11 cases is tricky, but I'm not aware -- I'm not  
12 aware of an Equal Protection Clause challenge to  
13 the third placement. And, indeed, I just want  
14 to reemphasize, as I said before, it has not  
15 been applied to any of the plaintiffs here.

16 JUSTICE GORSUCH: And, finally, I  
17 understand this Court sometimes speaks when  
18 Congress hasn't in Indian affairs, but -- but,  
19 here, we have a statute by Congress, and are you  
20 aware of any time this Court in 200 years has  
21 struck down as facially invalid an exercise of  
22 Congress's plenary powers over Indian affairs?

23 MR. GERSHENGORN: I am not.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Kavanaugh?



1 JUSTICE KAVANAUGH: Yeah, two  
2 questions. First, you mentioned the average age  
3 is six and a half. I assume that means there  
4 are hundreds or thousands of children who are  
5 relative newborns, one, two, three, over the  
6 years, who are affected by this statute.  
7 There's no age cutoff in the statute, or are you  
8 -- correct?

9 MR. GERSHENGORN: There is no age  
10 cutoff in the statute.

11 JUSTICE KAVANAUGH: And are you aware  
12 that it's been applied differently with newborns  
13 or --

14 MR. GERSHENGORN: So, Your Honor --

15 JUSTICE KAVANAUGH: -- younger  
16 children?

17 MR. GERSHENGORN: -- that's a trickier  
18 question because -- I mean, that's one that I  
19 don't think anybody has the empirical research  
20 on. I think, as a practical matter, it would  
21 surprise me if it weren't, that the statute, the  
22 -- the good cause exception itself provides a  
23 different application. It says that the wishes  
24 of a -- of a child who is old enough to express  
25 them are taken into account.

1           The cultural bonds that an older child  
2 would have almost certainly would be taken into  
3 account if the child comes in and says, you  
4 know, I have a friend group, I have a sports  
5 team, I have after school activities. So I --

6           JUSTICE KAVANAUGH: But you're not --  
7 those are good points, but you're not aware that  
8 that's reflected in any case law --

9           MR. GERSHENGORN: We're on a facial  
10 challenge, Your Honor --

11          JUSTICE KAVANAUGH: Yeah.

12          MR. GERSHENGORN: -- so I'm not aware  
13 of --

14          JUSTICE KAVANAUGH: Yeah.

15          MR. GERSHENGORN: -- anything in the  
16 record one way or the other on that.

17          JUSTICE KAVANAUGH: Right.

18          MR. GERSHENGORN: That's the problem,  
19 I think, not the solution.

20          JUSTICE KAVANAUGH: No, a fair point.

21          Secondly, on the land question, I just  
22 want to get -- make sure this sentence from  
23 Mancari -- that you can respond to it:  
24 "Literally every piece of legislation dealing  
25 with Indian tribes and reservations and

1 certainly all legislation dealing with BIA  
2 single out for special treatment a constituency  
3 of tribal Indians living on or near  
4 reservations."

5 Is that accurate then? Is it still  
6 accurate now?

7 MR. GERSHENGORN: I think it was -- I  
8 think the scope of history of Indian law  
9 suggests that it is not accurate and was never  
10 accurate. They -- Congress has legislated for  
11 tribal -- tribal members off the land and has  
12 legislated for non-Indians under the Indian  
13 powers from the beginning.

14 But, as I said, like, to me, the  
15 bigger problem is -- is -- two -- two points,  
16 Your Honor. One is I really think it's  
17 important that Mancari isn't the root of the  
18 Congress's special treatment of Indians. That  
19 dates back to the text of the Constitution and  
20 from the very first Trade and Intercourse Acts,  
21 that -- that started, and then for the reasons  
22 I've said and I won't repeat --

23 JUSTICE KAVANAUGH: That's fair.

24 MR. GERSHENGORN: -- I think land is  
25 like -- is just a nonsensical -- a nonsensical

1 way to crosscut given what the Constitution was  
2 trying to do vis-à-vis the Articles of  
3 Confederation, given the history of the  
4 treatment, and given --

5 JUSTICE KAVANAUGH: Your --

6 MR. GERSHENGORN: -- what this Court  
7 has said over --

8 JUSTICE KAVANAUGH: -- your point --  
9 sorry, because time --

10 MR. GERSHENGORN: I'm sorry. I'm  
11 sorry.

12 JUSTICE KAVANAUGH: -- is running.  
13 Your -- you point is the sentence is not  
14 accurate? I mean, the tip-off should have been  
15 the word "literally," I suppose, but it's in  
16 there.

17 (Laughter.)

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Barrett?

21 JUSTICE BARRETT: Active efforts, I'm  
22 just trying to get a picture for how this works.  
23 You're saying it applies to private parties and  
24 the state. And this is just because I'm having  
25 a difficult time imagining how this actually

1 happens on the ground.

2           You have to show that efforts have  
3 been made to provide remedial services and  
4 rehabilitation programs designed to prevent the  
5 breakup of the Indian family. Who -- I mean,  
6 Texas says, well, that's -- those are state-run  
7 programs that would be those efforts, like the  
8 rehabilitation.

9           MR. GERSHENGORN: Yeah.

10          JUSTICE BARRETT: How does that work  
11 in the context --

12          MR. GERSHENGORN: So, Your Honor --

13          JUSTICE BARRETT: -- of a private  
14 party?

15          MR. GERSHENGORN: -- I have to confess  
16 I don't know, and I -- I apologize for that.

17          JUSTICE BARRETT: No.

18          MR. GERSHENGORN: I don't know how  
19 that works in the real world in private  
20 placements. It doesn't seem to me that it  
21 inevitably has to go through the state services,  
22 but the candid answer to your question is I just  
23 don't know.

24          JUSTICE BARRETT: Okay. And then one  
25 other quick question. Would your client have

1 any objection -- I -- I asked General Stone,  
2 okay, well, one -- one argument that the  
3 government makes is this isn't commandeering  
4 because you can walk away. You know, you can  
5 decide not to do this. Would your client have  
6 any objection then if the State of Texas --  
7 General Stone said our substantive law requires  
8 us to undertake efforts to place children in  
9 foster care in these circumstances, and it would  
10 be unmanageable for us to discern when a child  
11 is Indian or a member of a tribe or not?

12 Let's imagine Texas says, okay, we  
13 want to walk away, we don't want to engage in  
14 these active efforts, so we're just going to get  
15 out of the business, and if we can discern that  
16 a child is a member of a tribe, our agencies  
17 will not be involved in placing the children in  
18 foster care.

19 MR. GERSHENGORN: So, Your Honor, I --  
20 I mean, I think that would be a disaster on the  
21 ground --

22 JUSTICE BARRETT: But -- but could --

23 MR. GERSHENGORN: -- if that's what  
24 Your Honor is asking.

25 JUSTICE BARRETT: -- but would it be

1 legal for Texas to do that? Would there be an  
2 equal protection challenge that someone could  
3 bring against Texas for treating Indian children  
4 differently when it comes to foster placement?

5 I mean, you're saying --

6 MR. GERSHENGORN: I don't -- yeah.

7 JUSTICE BARRETT: -- that there would  
8 be political consequences or practical  
9 consequences to Texas walking away from foster  
10 care. And I agree.

11 MR. GERSHENGORN: Yeah.

12 JUSTICE BARRETT: And General Stone  
13 made that point. I guess what I'm --

14 MR. GERSHENGORN: I think it would be  
15 hard to argue, Your Honor -- I'm sorry to cut  
16 you off. Finish your question.

17 JUSTICE BARRETT: Oh, no, I was just  
18 going to say, but what I'm asking is, if we're  
19 thinking about whether Texas has a legal choice,  
20 it --

21 MR. GERSHENGORN: Yeah.

22 JUSTICE BARRETT: -- there might be  
23 practical considerations. I guess I'm trying to  
24 figure out is this really voluntary --

25 MR. GERSHENGORN: So I think I would

1 have to say, Your Honor, given that there were  
2 no -- for the first 150 some odd years of our  
3 country, there was no childcare system at all,  
4 that it would be hard for me to say that Texas  
5 is constitutionally required to have one.

6 But that's --

7 JUSTICE BARRETT: But, if they have  
8 one, could they cut Indian children out of it,  
9 is my question? Because they don't have to --

10 MR. GERSHENGORN: No. I think --

11 JUSTICE BARRETT: -- obey ICWA with  
12 respect to -- or follow --

13 MR. GERSHENGORN: I think, if Texas --  
14 I think that would raise serious equal  
15 protection problems if that --

16 JUSTICE BARRETT: So they don't have a  
17 choice then --

18 MR. GERSHENGORN: Well, they have --

19 JUSTICE BARRETT: -- about complying?

20 MR. GERSHENGORN: -- a choice whether  
21 to participate in the proceedings at all. They  
22 may or may -- they -- what they may not be able  
23 to do is say I'm doing it only for non-Indian  
24 children.

25 JUSTICE BARRETT: Participate in



1 proceedings --

2 MR. GERSHENGORN: In -- in --

3 JUSTICE BARRETT: -- you mean in  
4 foster care?

5 MR. GERSHENGORN: Correct.

6 JUSTICE BARRETT: In the foster care  
7 system?

8 MR. GERSHENGORN: Correct. I don't  
9 think there's any constitutional requirement  
10 they have a foster care system --

11 JUSTICE BARRETT: But, if they have a  
12 foster care system, they couldn't say because of  
13 what ICWA requires us to undertake in these  
14 active efforts and the -- you know, they  
15 complain about the recordkeeping, we just want  
16 none of that, so we're going to walk away from  
17 that, we're not going to let the federal  
18 government impose those obligations on us?

19 MR. GERSHENGORN: So I think that's  
20 right, but I have to say, of all the answers  
21 I've given today, that's the one I'm least  
22 confident of.

23 (Laughter.)

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: Yeah. So is the  
3 reason that you, in response to Justice Barrett,  
4 the first part of her question, said that you  
5 don't really know the details of how ICWA would  
6 play out in the ways that she indicated is  
7 because we're here on a facial challenge and not  
8 an as-applied challenge? You focused on that a  
9 couple times.

10 MR. GERSHENGORN: I think it's most  
11 honest to say yes, compounded by my own  
12 ignorance.

13 (Laughter.)

14 JUSTICE JACKSON: Okay. Well, can you  
15 just help me to understand the implications of  
16 the facial versus as-applied --

17 MR. GERSHENGORN: Yes.

18 JUSTICE JACKSON: -- nature of the  
19 challenge that's being --

20 MR. GERSHENGORN: Sure.

21 JUSTICE JACKSON: -- that's being  
22 brought here?

23 MR. GERSHENGORN: I think it comes in  
24 -- in two important ways. First of all, I think  
25 it completely changes the standard of review

1 that this Court -- that this Court uses. What  
2 the Court has said in facial challenges is  
3 statutes -- congressional statutes survive if  
4 they have a plainly legitimate scope. And so I  
5 think that, like, it completely changes the way  
6 we talk about, for example, the -- the third --  
7 the third preference.

8           And, you know, then I think, on the  
9 flip side, in addition to sort of the change in  
10 legal standard, it changes how we talk about it.  
11 What we are talking about here is a series of  
12 hypotheticals. Honestly, we don't even have the  
13 facts of the individual cases before us.  
14 Remember, these aren't childcare proceedings. I  
15 mean, there's a debate about -- about Child P,  
16 and then there's an amicus brief from the  
17 grandmother. They're -- they're presenting  
18 starkly different views of what happened.

19           The reason we're doing this is because  
20 we're on facial challenge. Right? How this  
21 plays out in the real world, what the limits  
22 are, this is a very, very difficult area of the  
23 law as the last two or three hours have shown.

24           And -- and to decide it on the basis  
25 of hypotheticals that never arise in the real

1 world and yet take away a statute that has made  
2 such a meaningful difference for so many  
3 children seems to me just like not the way this  
4 Court should be deciding questions.

5           Go back to what I said at the start.  
6 Deciding a facial challenge to a statute in a  
7 situation where there is no standing seems to me  
8 like a very poor way to resolve major challenges  
9 to critical legislation.

10           CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel. The case is submitted -- no? I'm  
12 sorry, Mr. McGill.

13           (Laughter.)

14           CHIEF JUSTICE ROBERTS: It is late.

15           REBUTTAL ARGUMENT OF MATTHEW D. MCGILL  
16 ON BEHALF OF CHAD EVERET BRACKEEN, ET AL.

17           MR. MCGILL: Thank you very much, Mr.  
18 Chief Justice. I will take the hint.

19           (Laughter.)

20           MR. MCGILL: I -- I -- I want to start  
21 with how this works in practice. I assure you  
22 it is not at all hypothetical. It starts with  
23 the Brackeens and families like them being on a  
24 list of willing foster care providers.

25           Joint Appendix 108 says we are willing

1 to be foster parents for other children in the  
2 future. When a child comes into the foster care  
3 system, the preferences are applied. That's  
4 1915(b).

5 The final rule is applied. The good  
6 cause requirement to the final rule is applied.  
7 And it is applied each and every time an Indian  
8 child comes into the system. This is not like  
9 Halley's Comet. It comes around a lot.

10 In Texas alone, in -- in Footnote 4 of  
11 the district court opinion, 39 children, Indian  
12 children in the state foster care system. Joint  
13 Appendix 108, Texas alleges this happens several  
14 times a year.

15 How does the good cause requirement  
16 get applied on the ground? I would ask the  
17 Court to please look at the -- the court of  
18 appeals decision in YRJ's case called Interest  
19 of YRJ.

20 It says that seeking to establish good  
21 cause for not following the placement  
22 preferences, the -- the party must bring forth  
23 by clear and convincing evidence of good cause,  
24 that good cause must be based on at least one of  
25 several considerations.

1           My friend on the other side says this  
2 is a disarray in the state courts. I would  
3 respectfully suggest it is regulatory design.

4           The government, in any event, has  
5 conceded that this is intended to override the  
6 normal application of the best interest tests.  
7 We heard a little bit about the third  
8 preference. The government suggests that it  
9 applies to maybe only related tribes. We know  
10 why it applies. It's in this Court's decision  
11 in Holyfield.

12           There is a federal policy to send  
13 Indian children to the Indian community, not  
14 their community, as the government seeks to  
15 alter it in the brief, the Indian -- Indian  
16 community writ large.

17           We heard that the proprietary interest  
18 is maybe just a duty of protection. I would  
19 submit YRJ was a citizen of Texas before she was  
20 given her -- her certificate of Indian blood.  
21 Texas has at least as much proprietary interest  
22 as the Navajo Nation does here.

23           The third preference and the  
24 biological component of the Indian child  
25 definition is the smoking gun textual evidence

1 here that Congress was acting with a racial  
2 purpose.

3           And it's backstopped by the House  
4 Report, which talks about identifying the  
5 children who have common blood. It says that  
6 blood relationship is the very touchstone of the  
7 ability to remain, to enjoy the benefits of a  
8 tribe.

9           The government here is making, in  
10 fact, the same argument it made in Rice on the  
11 equal protection point. You can see that from  
12 Justice Ginsburg's one paragraph dissent. But  
13 there's one notable exception.

14           In Rice at oral argument the  
15 government was prepared to -- to concede that  
16 these preferences could not be applied in the  
17 outer world. It -- and it recognized that this  
18 distinction was rooted in Mancari itself.

19           So that's why Rice concludes that the  
20 administration of state laws by a state agency  
21 is that outer world.

22           It's the new and larger dimension to  
23 which Mancari could not possibly be applied.  
24 That -- the government here is even broader than  
25 it made in Rice. And it can't be squared with

1 Rice's holding that a tribal classification can  
2 be a proxy for race.

3 The classification was political in  
4 Mancari because it directly advanced tribes'  
5 ability to govern themselves. The justice in  
6 treasury hypotheticals, Justice Kavanaugh,  
7 present more difficult questions. It was  
8 conceded because the tie to self-governance in  
9 those cases is -- is much more attenuated.

10 Rice held that the Hawaii statute's  
11 advancement of indigenous self-government was  
12 insufficient to make that classification  
13 political because it operated in the sphere of  
14 administration of state laws by a state agency.

15 ICWA has no connection to tribal  
16 government at all. Whether YRJ is adopted by  
17 the Brackeens will not affect one iota the  
18 Navajo Nation's ability to pass its own laws or  
19 to govern themselves. It doesn't apply on  
20 Indian lands at all.

21 It doesn't even affect tribal  
22 existence. She is already a member of the  
23 Navajo Nation, and will remain so.

24 YRJ is subjected to a different legal  
25 standard here based on a status that she has



1 zero ability to control. That differing legal  
2 standard, the placement preferences, is at best  
3 a set of stereotypes about what is best for the  
4 child that's -- that has Indian ancestry.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel. The case is submitted.

7 (Whereupon, at 1:15 p.m., the case was  
8 submitted.)

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## Official - Subject to Final Review

<b>\$</b>	<b>4</b>	84:20 85:2 91:10 92:2,11 108:7 109:10 110:23 140: 7 147:22 168:9,11,24 181: 11,11,12 acted [4] 106:19,25 167:25 168:3 acting [8] 72:9 90:11 104: 13 140:13 142:8 145:5 156:4 206:1 action [3] 46:17 67:5 115: 18 actions [2] 39:24 90:21 active [22] 46:4,10 61:13, 19,21 62:9 66:21 67:2,7,17, 24 68:6 97:3 183:11 188: 20,22 189:13,14,16 195:21 197:14 200:14 activities [1] 193:5 actor [1] 58:18 acts [7] 37:21 63:10 70:2 167:7,11 168:13 194:20 actual [6] 18:16 47:22 88: 21 102:7 172:19,19 actually [16] 20:6 54:17 59: 4,20 66:3 90:14 96:2 119: 11 145:16 171:21 173:4 183:15 184:7,9 185:24 195:25 Adarand [3] 58:7 155:21 158:12 add [1] 90:6 addition [3] 16:8 188:7 202:9 additional [2] 45:2 50:21 address [5] 17:5 33:2 56: 14 104:20 188:19 addressed [3] 19:22 142: 15 167:23 addresses [1] 25:6 Addressing [4] 18:5 109: 13 110:24 161:23 adjudicates [1] 185:24 adjust [1] 17:12 administer [1] 55:16 administration [2] 206:20 207:14 administrative [2] 57:17 90:16 admissions [2] 44:13 149: 11 adopt [7] 5:2,7 69:4 81:13 116:9 117:7 150:16 adopted [5] 38:6 41:15 107:10 128:20 207:16 adopting [3] 129:24 144: 24 165:5 adoption [13] 5:22 12:1 82: 10 84:5 95:6,8 103:18 105: 3 106:20 117:14 129:4 185:25 186:3 adoptions [3] 79:17 83:11, 14 adoptive [6] 11:11 15:21 103:14 131:23 150:15 169:	4 [2] 3:5 204:10 40 [7] 41:14 103:20 129:18 139:12,16 180:18 191:6 42 [3] 57:19 101:12,14 42's [1] 101:25 44 [1] 189:1 45 [1] 57:13	<b>5</b>	5 [1] 80:14 50 [2] 82:9,9 519 [1] 28:14 54 [1] 189:2 55 [1] 3:8	<b>8</b>	81 [1] 48:4 85 [1] 189:2	<b>9</b>	9 [1] 1:25 90 [1] 122:24	<b>A</b>	a.m [2] 2:4 4:2 abduction [1] 8:17 ability [19] 14:13 18:18 28: 19 41:4,5 43:5,6 47:7 48: 24 72:6 102:25 104:15 127:22 146:12 183:13 206: 7 207:5,18 208:1 able [7] 73:21 90:5 96:12 171:13,13,14 199:22 above-entitled [1] 2:2 abroad [2] 137:7 143:12 abrogated [1] 49:2 absence [1] 188:13 absolute [6] 34:8 66:5,6 73:16 117:23 121:7 absolutely [6] 17:11 89:5 122:16 184:18 186:20 191: 4 abuse [3] 87:10 183:8,12 abuses [1] 146:8 accept [3] 63:25 99:1,2 access [5] 77:24 80:7,16 164:5 178:7 According [1] 4:11 account [18] 11:1,8 12:2,5, 21 95:2 119:25 125:15 138:15,19 153:6 162:10 165:25 166:3,4,6 192:25 193:3 accountability [2] 56:8 62: 5 accurate [5] 194:5,6,9,10 195:14 acknowledge [1] 33:19 acknowledged [1] 67:14 across [2] 19:22 108:6 Act [29] 4:14 14:18,23 15:3 17:16 30:14 37:8 38:18 59: 1 63:20 69:14 71:14 72:3	84:20 85:2 91:10 92:2,11 108:7 109:10 110:23 140: 7 147:22 168:9,11,24 181: 11,11,12 acted [4] 106:19,25 167:25 168:3 acting [8] 72:9 90:11 104: 13 140:13 142:8 145:5 156:4 206:1 action [3] 46:17 67:5 115: 18 actions [2] 39:24 90:21 active [22] 46:4,10 61:13, 19,21 62:9 66:21 67:2,7,17, 24 68:6 97:3 183:11 188: 20,22 189:13,14,16 195:21 197:14 200:14 activities [1] 193:5 actor [1] 58:18 acts [7] 37:21 63:10 70:2 167:7,11 168:13 194:20 actual [6] 18:16 47:22 88: 21 102:7 172:19,19 actually [16] 20:6 54:17 59: 4,20 66:3 90:14 96:2 119: 11 145:16 171:21 173:4 183:15 184:7,9 185:24 195:25 Adarand [3] 58:7 155:21 158:12 add [1] 90:6 addition [3] 16:8 188:7 202:9 additional [2] 45:2 50:21 address [5] 17:5 33:2 56: 14 104:20 188:19 addressed [3] 19:22 142: 15 167:23 addresses [1] 25:6 Addressing [4] 18:5 109: 13 110:24 161:23 adjudicates [1] 185:24 adjust [1] 17:12 administer [1] 55:16 administration [2] 206:20 207:14 administrative [2] 57:17 90:16 admissions [2] 44:13 149: 11 adopt [7] 5:2,7 69:4 81:13 116:9 117:7 150:16 adopted [5] 38:6 41:15 107:10 128:20 207:16 adopting [3] 129:24 144: 24 165:5 adoption [13] 5:22 12:1 82: 10 84:5 95:6,8 103:18 105: 3 106:20 117:14 129:4 185:25 186:3 adoptions [3] 79:17 83:11, 14 adoptive [6] 11:11 15:21 103:14 131:23 150:15 169:	20 adopts [2] 164:1 166:12 adults [2] 109:15 136:14 advance [4] 18:8,10 19:24 49:11 advanced [1] 207:4 advancement [1] 207:11 advantage [1] 110:20 adversely [1] 155:18 advisory [1] 186:25 advocates [1] 166:11 affair [1] 30:6 affairs [46] 10:10,15 14:13 17:4 22:8,10,11 23:6 24: 11,11,21 28:21 30:12 45:9, 11,13 47:20 49:18 50:2,8, 23 51:1,25 53:23 54:4,21 64:22 65:2,5,12 77:9 93:1 100:2,22,25 102:4 104:3 137:12 147:20 148:22,23 157:23 160:7 161:1 191: 18,22 affect [7] 31:8 41:3,5 190:6, 23 207:17,21 affected [4] 131:13 155:18 190:20 192:6 affects [2] 189:23 190:17 affiliated [1] 145:19 affiliation [1] 28:3 affinity [1] 153:12 affirm [1] 21:15 affirmative [1] 57:12 age [6] 138:14 143:8 182: 23 192:2,7,9 agencies [12] 44:3 46:16, 17,20,21 61:16 117:1 129: 19,23,23 148:14 197:16 agency [15] 21:1 25:3 57: 21 97:16 117:14,17 119:15 121:12,21 126:12 148:21 175:16,16 206:20 207:14 agency's [1] 5:12 ago [3] 139:16 141:2 180: 19 agree [18] 16:4 22:12 34:4, 10,12 62:17 66:24 74:16 81:8 88:3 89:2 98:18 132: 12,19 134:23 159:25 170: 22 198:10 agreed [2] 91:18 122:7 aha [1] 180:24 ahead [5] 107:7 111:4 124: 24 131:17 169:17 ahistorical [1] 99:20 aid [2] 108:15 145:22 aiding [1] 104:13 AL [8] 1:3,10,21 2:8 3:5,18 4:8 203:16 alarming [1] 87:11 Alaska [2] 171:4 172:11 albeit [1] 88:22 alcohol [3] 70:6,7 167:14 Alien [1] 63:10 alienating [1] 168:12	aliens [1] 136:8 aligned [1] 135:14 alike [1] 153:10 Alito [44] 25:10 68:10,19 84: 15 99:16 105:16 107:5,8, 17 108:17,22,25 109:20,24 110:7 111:1,3,5 122:6 125: 20 126:1 128:15,18 129:9, 12 136:13,14 138:6,18 139: 17 140:2 141:12,19 142:6 169:13,15,18,25 170:4,7 172:3 177:12 178:10 185: 12 Alito's [3] 112:10 142:24 157:19 all-encompassing [2] 74: 6 102:3 alleges [1] 204:13 allotment [1] 89:18 allotments [2] 90:6 180:8 allotted [2] 89:20,21 allow [6] 89:25 95:4 100:12 101:20 152:6 153:5 allowed [3] 13:11 97:21 126:12 allowing [2] 5:4 79:24 allows [7] 16:5,9,10 86:15, 15 121:9 166:13 alluded [1] 15:9 almost [1] 193:2 alone [7] 44:11 61:14 64:9 72:14 73:23 150:13 204: 10 already [7] 5:22,22 53:20 74:17,19 167:23 207:22 alter [2] 57:2 205:15 alternative [1] 118:22 alters [1] 109:25 although [3] 16:25 115:1 187:6 altogether [2] 97:25 133: 23 amalgamation [1] 106:3 amended [1] 186:4 Amendment [10] 10:16 27: 25 43:18 54:8 58:9,12 59: 8 61:1,4,5 Amendment's [2] 58:9 60: 16 American [12] 4:12,23 40: 1 44:2,13 45:3 93:2,24 143:19 148:13 149:12 168: 25 Americans [4] 39:21 77:17, 24 79:2 amicus [3] 105:7 119:2 202:16 among [3] 37:9 124:4 153: 3 amount [4] 10:19 57:22 87: 3 90:2 amounts [1] 57:7 ample [1] 99:21 anachronistic [2] 39:6,13
-----------	----------	--	---	----------	---	----------	-----------------------------	----------	-----------------------------	----------	---	--	--	--

## Official - Subject to Final Review

<p><b>analogized</b> <sup>[1]</sup> 96:10  <b>analogizes</b> <sup>[1]</sup> 96:10  <b>analogue</b> <sup>[1]</sup> 65:19  <b>analysis</b> <sup>[2]</sup> 176:15,17  <b>analyze</b> <sup>[1]</sup> 111:6  <b>analyzed</b> <sup>[1]</sup> 114:22  <b>ancestry</b> <sup>[4]</sup> 32:13 95:2  137:2 208:4  <b>ancillary</b> <sup>[1]</sup> 63:3  <b>announces</b> <sup>[1]</sup> 105:21  <b>another</b> <sup>[15]</sup> 9:23 49:16 63:10 133:19 135:25 137:14 138:3 151:3,18 153:7 171:6 173:7 183:21 184:11 185:8  <b>answer</b> <sup>[15]</sup> 7:19 20:7 26:12 43:25 67:3 81:22 101:13 114:18 126:3 154:17 164:23 174:20 176:15 184:4 196:22  <b>answering</b> <sup>[1]</sup> 112:21  <b>answers</b> <sup>[3]</sup> 65:14 116:22 200:20  <b>Antelope</b> <sup>[1]</sup> 28:15  <b>anti-commandeering</b> <sup>[29]</sup> 53:14 54:1,6,18,20 59:13 60:6,12 61:10 62:7 63:23 64:15,18 68:11,17 82:4,18 83:2,8,15 84:8,25 86:4,6,13 88:6 99:11 100:7 190:8  <b>anti-delegation</b> <sup>[1]</sup> 59:13  <b>anybody</b> <sup>[2]</sup> 42:6 192:19  <b>anytime</b> <sup>[2]</sup> 59:24 146:7  <b>anyway</b> <sup>[1]</sup> 174:3  <b>APA</b> <sup>[3]</sup> 186:8,9,9  <b>Apache</b> <sup>[1]</sup> 76:4  <b>apologize</b> <sup>[1]</sup> 196:16  <b>appeal</b> <sup>[1]</sup> 139:3  <b>appeals</b> <sup>[2]</sup> 12:8 204:18  <b>APPEARANCES</b> <sup>[1]</sup> 2:6  <b>appears</b> <sup>[1]</sup> 185:3  <b>Appendix</b> <sup>[2]</sup> 203:25 204:13  <b>applicable</b> <sup>[1]</sup> 178:9  <b>application</b> <sup>[6]</sup> 116:23 117:4 125:2 188:1 192:23 205:6  <b>applications</b> <sup>[2]</sup> 70:18 131:16  <b>applied</b> <sup>[21]</sup> 42:2 54:17 66:7 95:18 113:11 123:6 141:17 164:20 165:7 170:24 171:16 188:10 191:15 192:12 204:3,5,6,7,16 206:16,23  <b>applies</b> <sup>[17]</sup> 14:11 46:15 53:19 60:18 64:15 68:12 108:6 131:5 163:20 171:7 178:11 189:3,5,17 195:23 205:9,10  <b>apply</b> <sup>[10]</sup> 67:4,8 91:25 92:1 110:1 141:20 151:20 159:1,4 207:19  <b>applying</b> <sup>[4]</sup> 55:23 56:2 85:</p>	<p>5 89:7  <b>appointment</b> <sup>[1]</sup> 82:22  <b>appreciate</b> <sup>[1]</sup> 89:17  <b>approach</b> <sup>[1]</sup> 115:20  <b>appropriate</b> <sup>[5]</sup> 90:14 106:24 108:15 113:15 128:4  <b>appropriation</b> <sup>[1]</sup> 93:11  <b>approved</b> <sup>[1]</sup> 110:18  <b>arbitrarily</b> <sup>[1]</sup> 136:3  <b>arbitrary</b> <sup>[3]</sup> 110:24 113:15 115:21  <b>area</b> <sup>[21]</sup> 13:10,10 17:18 18:19 33:15 38:25 39:16,24 47:16 48:7 52:20 53:19,25 54:3 64:15 87:18 91:8 93:7 127:13 156:6 202:22  <b>areas</b> <sup>[8]</sup> 14:11 73:20 75:13 79:2 101:10 110:1 145:9 158:24  <b>aren't</b> <sup>[3]</sup> 19:1 63:4 202:14  <b>arguably</b> <sup>[1]</sup> 15:7  <b>argue</b> <sup>[1]</sup> 198:15  <b>argued</b> <sup>[1]</sup> 33:14  <b>arguing</b> <sup>[2]</sup> 40:3 114:9  <b>argument</b> <sup>[37]</sup> 2:3 3:2,6,9,12,15 4:4,7 19:13,18 20:1,3 27:9 28:8 33:14,19 36:3 38:24 43:13 46:3 47:12 55:11 59:2 65:20,25 66:13 68:22 70:11 89:23 100:14 103:9 128:6 162:19 197:2 203:15 206:10,14  <b>arguments</b> <sup>[5]</sup> 19:21,24 44:19 111:10 188:19  <b>arise</b> <sup>[3]</sup> 54:20 140:25 202:25  <b>arises</b> <sup>[5]</sup> 6:16 16:11 51:5 54:7 146:14  <b>arising</b> <sup>[1]</sup> 146:8  <b>Arizona</b> <sup>[3]</sup> 171:9 173:12 184:23  <b>arose</b> <sup>[3]</sup> 51:23 55:6 149:3  <b>around</b> <sup>[5]</sup> 49:8 81:11 82:3 93:16 204:9  <b>arrangement</b> <sup>[2]</sup> 41:16 125:9  <b>arrangements</b> <sup>[1]</sup> 40:18  <b>arrested</b> <sup>[1]</sup> 84:22  <b>arrival</b> <sup>[1]</sup> 172:6  <b>Article</b> <sup>[47]</sup> 13:25 19:16 22:21 33:14,23 38:10,15,20 40:9 47:12 68:21 69:4 74:17 78:17 80:21 81:20 83:2,4,5,6,22 84:24 86:3,8 88:6 90:8 92:17,18 94:3,9 101:16 102:1 105:18 107:21,24 139:9,24 141:23 142:3 144:25 145:12 147:3 157:16 158:18,20 161:10 185:22  <b>articles</b> <sup>[7]</sup> 35:16 50:16 101:3,16 102:2 169:4 195:2  <b>articulate</b> <sup>[1]</sup> 158:9</p>	<p><b>articulated</b> <sup>[1]</sup> 120:18  <b>articulating</b> <sup>[1]</sup> 52:11  <b>as-applied</b> <sup>[6]</sup> 172:19,25 184:21 191:2 201:8,16  <b>Asian</b> <sup>[3]</sup> 132:16,17 155:23  <b>aside</b> <sup>[10]</sup> 33:11 34:20 36:15 38:3 57:24 58:5 82:23 97:21 98:5 105:5  <b>aspect</b> <sup>[7]</sup> 47:12 111:23 144:13 150:23 155:17 174:2,5  <b>aspects</b> <sup>[2]</sup> 66:15 147:6  <b>assert</b> <sup>[3]</sup> 187:20,22 188:4  <b>assessed</b> <sup>[1]</sup> 106:22  <b>assessment</b> <sup>[1]</sup> 115:22  <b>Assistance</b> <sup>[1]</sup> 168:25  <b>associated</b> <sup>[1]</sup> 24:15  <b>assume</b> <sup>[8]</sup> 98:25 110:23 117:3,3 122:5 123:8 134:23 192:3  <b>assumed</b> <sup>[4]</sup> 30:1,2 161:15,16  <b>assumes</b> <sup>[1]</sup> 64:14  <b>assuming</b> <sup>[6]</sup> 24:9 29:20 85:21,23 134:14,16  <b>assumption</b> <sup>[1]</sup> 170:1  <b>assure</b> <sup>[1]</sup> 203:21  <b>atmosphere</b> <sup>[2]</sup> 88:10,12  <b>attachment</b> <sup>[5]</sup> 5:14 6:16 12:21 13:3 166:3  <b>attempt</b> <sup>[1]</sup> 95:17  <b>attempted</b> <sup>[3]</sup> 88:17 94:5 163:10  <b>attempting</b> <sup>[1]</sup> 94:2  <b>attend</b> <sup>[1]</sup> 145:23  <b>attention</b> <sup>[1]</sup> 191:8  <b>attenuated</b> <sup>[3]</sup> 45:6 149:24 207:9  <b>Austin</b> <sup>[1]</sup> 2:9  <b>authorities</b> <sup>[1]</sup> 84:22  <b>authority</b> <sup>[29]</sup> 9:20 12:2 15:19 24:10 37:2,14 49:18,22 50:1,4,7,22,24 53:21 64:23 65:9,9 91:12 100:9 101:9 104:25 105:2 109:9 160:7,9,20 161:12 163:11 168:18  <b>automatically</b> <sup>[3]</sup> 137:5 138:1 143:13  <b>available</b> <sup>[2]</sup> 134:17 188:5  <b>average</b> <sup>[2]</sup> 182:23 192:2  <b>aware</b> <sup>[12]</sup> 10:5 42:6 54:23 55:17 65:19 191:6,11,12,20 192:11 193:7,12  <b>away</b> <sup>[14]</sup> 54:4 91:20,23 97:7,12 127:1,3 149:6 155:4 197:4,13 198:9 200:16 203:1  <b>awkward</b> <sup>[1]</sup> 91:11</p>	<p><b>97:3 100:14 108:11 123:11 153:13 165:10 178:16 181:17 194:19 203:5</b>  <b>background</b> <sup>[1]</sup> 65:4  <b>backstopped</b> <sup>[1]</sup> 206:3  <b>backwards</b> <sup>[1]</sup> 75:25  <b>bad</b> <sup>[1]</sup> 185:15  <b>bail</b> <sup>[3]</sup> 15:4 63:25 84:21  <b>baked</b> <sup>[1]</sup> 50:10  <b>balance</b> <sup>[1]</sup> 190:6  <b>ball</b> <sup>[1]</sup> 24:20  <b>Band</b> <sup>[1]</sup> 76:4  <b>Bank</b> <sup>[1]</sup> 17:1  <b>banning</b> <sup>[1]</sup> 167:14  <b>bare</b> <sup>[5]</sup> 175:8,13 178:17,17,18  <b>BARRETT</b> <sup>[61]</sup> 13:7,22 15:9 18:22 46:1,2 47:8 53:10 61:9 62:13 66:17 82:12 97:1,2 98:10 133:13,25 134:7,10,13 135:2 154:2,14,23 156:7,10,19 157:3,7,11 158:17,22,25 159:8,11 167:3 173:20 174:13 188:9 195:20,21 196:10,13,17,24 197:22,25 198:7,12,17,22 199:7,11,16,19,25 200:3,6,11,24 201:3  <b>Barrett's</b> <sup>[1]</sup> 67:3  <b>based</b> <sup>[13]</sup> 10:18 45:20 48:14 132:24 137:1,1 156:16 162:14 170:1,7,8 204:24 207:25  <b>bases</b> <sup>[2]</sup> 62:11 81:6  <b>basically</b> <sup>[4]</sup> 8:17 58:25 75:1 187:12  <b>basing</b> <sup>[3]</sup> 172:13,14 174:15  <b>basis</b> <sup>[24]</sup> 6:19 51:2,9 82:10 88:15,23 91:19 96:4 103:24 106:13,18 114:24 115:2 128:11 134:3 139:18 140:5 141:15,17,25 151:10 155:3,7 202:24  <b>bear</b> <sup>[1]</sup> 109:5  <b>became</b> <sup>[1]</sup> 100:19  <b>become</b> <sup>[2]</sup> 103:22 182:18  <b>becomes</b> <sup>[2]</sup> 62:24 138:2  <b>begin</b> <sup>[1]</sup> 75:24  <b>beginning</b> <sup>[8]</sup> 56:23 75:21 161:7 166:19 168:8 180:22 181:9 194:13  <b>begs</b> <sup>[1]</sup> 170:16  <b>behalf</b> <sup>[14]</sup> 2:8,10,12,15 3:4,8,11,14,17 4:8 55:12 103:10 162:20 203:16  <b>behind</b> <sup>[1]</sup> 146:16  <b>beings</b> <sup>[1]</sup> 43:15  <b>believe</b> <sup>[5]</sup> 7:22 17:10 35:10 74:1 98:20  <b>believed</b> <sup>[1]</sup> 160:8  <b>belong</b> <sup>[1]</sup> 59:16  <b>belonged</b> <sup>[1]</sup> 133:23  <b>belongs</b> <sup>[2]</sup> 133:18,19</p>	<p><b>benefit</b> <sup>[2]</sup> 157:1 177:10  <b>benefits</b> <sup>[3]</sup> 32:3 143:18 206:7  <b>Bennett</b> <sup>[1]</sup> 20:25  <b>best</b> <sup>[51]</sup> 4:15 5:13 8:12,14 9:5,6 10:1,24 11:1,19,20 12:5,23 62:3 116:11,19,23 117:4,14 118:7,14,16,19 119:17,22 120:16 121:14 123:10,11 125:2,10,16 126:13 130:13 150:17 161:20 162:3,5,13 163:25 164:19,25 165:4,5,17 166:14 168:2 182:12 205:6 208:2,3  <b>better</b> <sup>[8]</sup> 19:18,21 20:3 45:2 68:2 116:15 126:19 188:14  <b>between</b> <sup>[25]</sup> 15:1 22:8 23:5,21 25:7,16 37:7,12 45:8 76:9 91:7,13,17 92:5 94:17 102:17,19 115:7 132:4 137:10 146:6,9 147:25 154:25 173:20  <b>beyond</b> <sup>[10]</sup> 10:4 44:3 69:4 70:23 74:19 103:4 128:1 131:5 147:7 158:24  <b>BIA</b> <sup>[9]</sup> 29:9 44:3 45:21 148:14,21 154:7,23 176:25 194:1  <b>bigger</b> <sup>[1]</sup> 194:15  <b>billion</b> <sup>[1]</sup> 57:21  <b>bind</b> <sup>[2]</sup> 185:23 186:18  <b>binding</b> <sup>[2]</sup> 6:8 165:15  <b>binds</b> <sup>[1]</sup> 187:1  <b>biological</b> <sup>[1]</sup> 205:24  <b>birth</b> <sup>[3]</sup> 137:6,8 138:1  <b>bit</b> <sup>[5]</sup> 49:23 62:14 81:5 165:14 205:7  <b>bite</b> <sup>[2]</sup> 77:12 175:21  <b>bitten</b> <sup>[1]</sup> 78:5  <b>black</b> <sup>[3]</sup> 132:14,15 155:23  <b>blood</b> <sup>[7]</sup> 23:24 24:3 25:9 174:4 205:20 206:5,6  <b>board</b> <sup>[1]</sup> 108:6  <b>boarding</b> <sup>[10]</sup> 26:4 39:25 40:2,4,7 93:5,9 108:18 140:24 161:24  <b>boats</b> <sup>[1]</sup> 102:25  <b>body</b> <sup>[2]</sup> 96:3,3  <b>boils</b> <sup>[1]</sup> 47:13  <b>bond</b> <sup>[2]</sup> 5:1 81:17  <b>bonding</b> <sup>[4]</sup> 6:16 12:21 13:2 166:4  <b>bonds</b> <sup>[2]</sup> 183:1 193:1  <b>book</b> <sup>[1]</sup> 175:24  <b>books</b> <sup>[1]</sup> 26:3  <b>born</b> <sup>[3]</sup> 116:4 143:11 144:2  <b>both</b> <sup>[17]</sup> 5:16 19:24 29:22 46:15 48:3 67:8,10,11 69:21 86:4 93:16 98:16 127:17 141:23 142:5 149:19 160:1  <b>bottom</b> <sup>[2]</sup> 4:18 143:25</p>
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## Official - Subject to Final Review

<b>bounds</b> <sup>[1]</sup> 74:18 <b>boxes</b> <sup>[1]</sup> 116:10 <b>BRACKEEN</b> <sup>[8]</sup> 1:10 2:8 3:4,17 4:5,8 97:15 203:16 <b>Brackeens</b> <sup>[5]</sup> 5:7,9,14 203:23 207:17 <b>Brackeens'</b> <sup>[1]</sup> 46:20 <b>brance</b> <sup>[2]</sup> 62:8 63:13 <b>breach</b> <sup>[1]</sup> 65:22 <b>breakup</b> <sup>[3]</sup> 46:12 132:5 196:5 <b>brief</b> <sup>[12]</sup> 11:14 35:1 87:2,4 105:7 119:2 166:8 182:25 189:2,7 202:16 205:15 <b>briefing</b> <sup>[1]</sup> 185:4 <b>Briefly</b> <sup>[1]</sup> 23:4 <b>briefs</b> <sup>[2]</sup> 89:15 111:9 <b>bring</b> <sup>[4]</sup> 18:3 187:25 198:3 204:22 <b>bringing</b> <sup>[1]</sup> 67:5 <b>broad</b> <sup>[2]</sup> 13:9 75:2 <b>broader</b> <sup>[2]</sup> 18:17 206:24 <b>broadly</b> <sup>[2]</sup> 101:24 133:15 <b>broth</b> <sup>[1]</sup> 69:20 <b>brought</b> <sup>[4]</sup> 65:20 102:10 191:8 201:22 <b>bucket</b> <sup>[1]</sup> 71:21 <b>buckets</b> <sup>[1]</sup> 77:19 <b>budget</b> <sup>[1]</sup> 57:21 <b>building</b> <sup>[1]</sup> 184:12 <b>built</b> <sup>[1]</sup> 173:8 <b>built-in</b> <sup>[1]</sup> 158:7 <b>bumps</b> <sup>[2]</sup> 149:24 158:2 <b>burden</b> <sup>[2]</sup> 63:3 125:5 <b>burdens</b> <sup>[1]</sup> 14:24 <b>business</b> <sup>[1]</sup> 197:15 <b>busy</b> <sup>[3]</sup> 78:5 81:1,2 <b>buy</b> <sup>[1]</sup> 112:1 <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <b>C.F.R</b> <sup>[2]</sup> 5:25 57:14 <b>California</b> <sup>[1]</sup> 169:10 <b>call</b> <sup>[2]</sup> 111:21 173:12 <b>called</b> <sup>[3]</sup> 54:13 107:3 204:18 <b>calls</b> <sup>[2]</sup> 29:20 82:11 <b>came</b> <sup>[3]</sup> 2:2 53:14 100:3 <b>candid</b> <sup>[1]</sup> 196:22 <b>candidly</b> <sup>[1]</sup> 165:12 <b>cannot</b> <sup>[11]</sup> 13:25 22:7 31:22 37:2 43:19 55:15 56:5 63:22 141:5 166:6 168:2 <b>capacity</b> <sup>[2]</sup> 109:7,12 <b>capital</b> <sup>[1]</sup> 54:16 <b>card</b> <sup>[1]</sup> 5:5 <b>care</b> <sup>[21]</sup> 4:13 6:23,24 46:8 97:10,17 105:2 123:24 145:21 168:24 183:14 197:9,18 198:10 200:4,6,10,12 203:24 204:2,12 <b>carried</b> <sup>[1]</sup> 34:10 <b>carries</b> <sup>[1]</sup> 93:17 <b>carry</b> <sup>[4]</sup> 22:23 52:9 58:14 107:2	<b>carrying</b> <sup>[1]</sup> 108:15 <b>carveout</b> <sup>[1]</sup> 169:5 <b>carving</b> <sup>[1]</sup> 105:9 <b>Case</b> <sup>[74]</sup> 4:4 8:22 11:12 12:9 23:11 24:1 27:16,25 28:19 29:6,21 32:16 34:12 36:20 41:23 45:15 46:20 49:1 50:18 53:10 54:13,17 56:14 62:8,21,24 65:17 78:8,10,13 90:13 98:14,23 107:23 110:3 118:21,24 119:12 121:15 123:7 125:23 127:23 129:22 131:12,13 135:21,22 139:2,4 146:1 151:11 153:24 154:4 158:12 163:16 167:13 171:12 172:18,21 173:25 174:2,5 176:3,5 177:2 181:23 185:15 186:24 189:17 193:8 203:11 204:18 208:6,7 <b>caseload</b> <sup>[1]</sup> 190:9 <b>cases</b> <sup>[48]</sup> 4:5 13:6 14:9,10,18,20 15:8 26:6 27:13,19 28:7,13,16,17 41:24 47:1,4 48:21 50:25 54:6,20 59:8 62:15 71:1 82:21,23 95:19 104:17 111:11 121:2 138:21,21 139:4 155:14 161:4,5 162:8 165:13 168:20,21 174:3 176:2 179:1 187:25 190:12 191:11 202:13 207:9 <b>Casey</b> <sup>[3]</sup> 119:2 166:8 182:25 <b>cast</b> <sup>[1]</sup> 17:25 <b>Castro-Huerta</b> <sup>[1]</sup> 85:7 <b>casts</b> <sup>[1]</sup> 44:7 <b>categorically</b> <sup>[1]</sup> 158:24 <b>categories</b> <sup>[7]</sup> 72:17 73:1,7 74:11,23 105:11 146:18 <b>categorization</b> <sup>[1]</sup> 19:1 <b>category</b> <sup>[2]</sup> 73:8 146:20 <b>Catholic</b> <sup>[1]</sup> 152:14 <b>causation</b> <sup>[2]</sup> 20:10,24 <b>cause</b> <sup>[30]</sup> 5:10,20 6:2,19 8:7 10:2 11:2,5,9,13 13:3 21:2 117:23 120:11,14 121:6 138:11,13 152:5 165:10,11,18,21,24 192:22 204:6,15,21,23,24 <b>caused</b> <sup>[2]</sup> 103:15 182:21 <b>causing</b> <sup>[1]</sup> 160:24 <b>cautioning</b> <sup>[1]</sup> 62:2 <b>caveat</b> <sup>[1]</sup> 112:18 <b>caveats</b> <sup>[1]</sup> 62:17 <b>Cayetano</b> <sup>[1]</sup> 22:6 <b>central</b> <sup>[1]</sup> 179:22 <b>centrally</b> <sup>[2]</sup> 66:14 144:18 <b>centuries</b> <sup>[2]</sup> 9:19 106:20 <b>centuries'</b> <sup>[1]</sup> 28:3 <b>century</b> <sup>[2]</sup> 93:6 163:12 <b>cert</b> <sup>[6]</sup> 7:5,10,24 8:1,3,6 <b>certain</b> <sup>[13]</sup> 64:1 83:12,13 84:3,4,21 85:12 86:12 88:	<b>19</b> 101:9 111:11 121:7 142:19 <b>certainly</b> <sup>[19]</sup> 24:1 39:1 56:19 59:3 69:6,23 70:16 75:15 76:15 82:7 85:4 90:4 97:7 135:16 157:6 169:23 173:11 193:2 194:1 <b>certificate</b> <sup>[1]</sup> 205:20 <b>cetera</b> <sup>[6]</sup> 8:20,21 99:9,9 109:10 161:14 <b>CHAD</b> <sup>[6]</sup> 1:10 2:8 3:4,17 4:8 203:16 <b>challenge</b> <sup>[26]</sup> 7:3,7 10:6 129:17 139:5 141:10 151:10 163:15 171:1,15 172:5,25 184:21,24 186:8,10,13 191:2,12 193:10 198:2 201:7,8,19 202:20 203:6 <b>challenged</b> <sup>[4]</sup> 7:1,6,16 66:23 <b>challenges</b> <sup>[8]</sup> 7:11,12 88:7 157:9 172:19,20 202:2 203:8 <b>challenging</b> <sup>[3]</sup> 12:11 62:11 98:22 <b>chance</b> <sup>[3]</sup> 87:1 91:20 188:19 <b>change</b> <sup>[5]</sup> 17:12 39:15 136:15 169:7 202:9 <b>changes</b> <sup>[4]</sup> 102:1 201:25 202:5,10 <b>channels</b> <sup>[2]</sup> 77:7 102:24 <b>chaotic</b> <sup>[1]</sup> 87:8 <b>characteristics</b> <sup>[1]</sup> 153:3 <b>characterization</b> <sup>[2]</sup> 174:4,15 <b>characterized</b> <sup>[1]</sup> 44:21 <b>charge</b> <sup>[1]</sup> 50:15 <b>check</b> <sup>[1]</sup> 116:10 <b>checkerboard</b> <sup>[1]</sup> 90:18 <b>checkerboards</b> <sup>[1]</sup> 89:18 <b>Cherokee</b> <sup>[4]</sup> 18:10 42:21 135:4 172:23 <b>CHIEF</b> <sup>[93]</sup> 4:3,9 10:23 11:22 22:24,25 23:2 25:10 27:10 33:8 42:15 45:25 47:9 55:2,8,13 83:17 84:12 86:24 88:25 94:11 96:25 98:11 103:6,11 106:12 107:4,6 111:2,4 112:3,5,9,15,19 113:3,12,16,23 114:8,18 115:3,24 117:2,12,19,24 118:5,10,17 119:9 120:6,13,23 121:3,11 124:16,20,21 125:24 126:1,2,7,10 127:8,10 136:11 142:9 144:21 148:3 159:22 162:17,21 164:17 173:18 174:8,20 175:25 176:7,10 183:17,19 184:1,16 185:10 188:16 191:24 195:19 200:25 203:10,14,18 208:5 <b>Chief's</b> <sup>[1]</sup> 130:1 <b>Child</b> <sup>[136]</sup> 4:13,15 5:16 6:	<b>20</b> 8:12,14,19 9:2,5 10:1,24 11:1,25 12:5,21 18:9 30:14 36:8,12 39:16 42:2 43:9 55:16 56:2 58:3 79:17 82:9,9,20 87:11 96:19 97:12,14,18 103:16,23 107:10 108:9,9 116:11,13,16,24 117:8,15,25 118:1,7,14,20 119:3,18,22 120:16 121:14,16,25 122:3 123:10,12,17 124:4 125:3,6,7,10,12,16,17 126:18,19 128:12,12,14,19,21,22,24 129:4,19 131:2,19 133:10 135:3 136:1,3,23,25 137:3,4,21 138:1,2,4,7,7,8,14 142:13 143:1,4 150:16,17 152:9 153:19 156:17,17 161:21 162:6,7 163:5 164:5,5,19 165:5,6 166:1,1,15 172:22 183:13,15,15,23 186:15 189:11 192:24 193:1,3 197:10,16 202:15 204:2,8 205:24 208:4 <b>child's</b> <sup>[5]</sup> 11:7 133:10 134:3 137:1 138:8 <b>childcare</b> <sup>[2]</sup> 199:3 202:14 <b>children</b> <sup>[87]</sup> 4:13,15,21,25 5:3 8:17 9:12,17 17:24,25 18:1 19:2 23:13 30:24 31:11,16 32:9 35:25 39:5 40:1,6 41:7,8 43:15 52:18 53:4 87:7,9 89:4,19,24 93:2,4,12 95:6,8 97:15 98:3 99:8 109:15 126:21 127:3 132:14,15,16,17 136:7,19,21 137:23,23 143:11,19 145:23 160:24 161:20 162:14,24 163:7,11 164:1,8 166:23 179:17 181:19,24 182:2,12,16,20,25 183:1,3,7 192:4,16 197:8,17 198:3 199:8,24 203:3 204:1,11,12 205:13 206:5 <b>children's</b> <sup>[1]</sup> 31:25 <b>Chinese</b> <sup>[1]</sup> 171:24 <b>choice</b> <sup>[7]</sup> 91:22,25 92:2 147:18 198:19 199:17,20 <b>choose</b> <sup>[5]</sup> 86:16 97:6,16,17 138:2 <b>chose</b> <sup>[1]</sup> 33:4 <b>Circuit</b> <sup>[1]</sup> 186:5 <b>circumstance</b> <sup>[3]</sup> 129:8 130:10 131:5 <b>circumstances</b> <sup>[13]</sup> 6:13 11:7 67:12 99:25 107:11,14 108:7 116:12 137:7 143:12 152:12 154:18 197:9 <b>cite</b> <sup>[3]</sup> 63:8 66:20 76:25 <b>cited</b> <sup>[2]</sup> 25:25 26:7 <b>cites</b> <sup>[3]</sup> 28:13,14 101:14 <b>citizen</b> <sup>[4]</sup> 24:18 137:7 143:20 205:19	<b>citizens</b> <sup>[6]</sup> 43:16 128:1 136:6 143:13,19 190:24 <b>citizenship</b> <sup>[13]</sup> 10:17,19,21 128:11 136:16 137:5,25 143:11 144:6,10 150:23 156:16,24 <b>Civil</b> <sup>[2]</sup> 109:10 181:11 <b>claiming</b> <sup>[1]</sup> 69:8 <b>claims</b> <sup>[4]</sup> 59:10,11,13 163:15 <b>clarify</b> <sup>[1]</sup> 156:10 <b>class</b> <sup>[2]</sup> 24:3,5 <b>classic</b> <sup>[2]</sup> 59:19 147:24 <b>classification</b> <sup>[28]</sup> 10:18 21:24,25 22:17 26:18,19,20 28:2 29:14 139:21 140:4,11 148:7,8 154:19,20,25 155:2,6,8,12 156:12 177:23 178:1,18 207:1,3,12 <b>classifications</b> <sup>[10]</sup> 22:7,9 29:8,15 45:10,11 134:24 139:19 141:21 154:9 <b>Clause</b> <sup>[25]</sup> 14:2 38:14,22 39:1 50:12 58:10 65:21 71:19 81:14,24,25 82:3 100:20 103:5 104:6 106:2 114:23 137:16 147:11,17 158:4 159:7 161:9 181:5 191:12 <b>clauses</b> <sup>[1]</sup> 55:22 <b>clean</b> <sup>[1]</sup> 57:4 <b>clear</b> <sup>[13]</sup> 12:13 29:8 30:18 33:1 57:14 69:7 76:5 96:1 160:18 172:13 176:14 186:21 204:23 <b>clearest</b> <sup>[1]</sup> 145:3 <b>clearly</b> <sup>[5]</sup> 75:19 96:21 170:20,22 171:22 <b>client</b> <sup>[2]</sup> 196:25 197:5 <b>clinics</b> <sup>[1]</sup> 75:11 <b>close</b> <sup>[3]</sup> 148:24 175:23 184:8 <b>closely</b> <sup>[3]</sup> 100:21 119:4 149:5 <b>closer</b> <sup>[3]</sup> 30:11,13 92:23 <b>clue</b> <sup>[1]</sup> 78:9 <b>Co</b> <sup>[1]</sup> 71:4 <b>Code</b> <sup>[2]</sup> 6:7 77:13 <b>Coil</b> <sup>[1]</sup> 54:13 <b>colleague</b> <sup>[2]</sup> 75:20 81:9 <b>colleagues</b> <sup>[1]</sup> 13:18 <b>colleagues'</b> <sup>[1]</sup> 47:19 <b>college</b> <sup>[2]</sup> 44:12 149:11 <b>colleges</b> <sup>[1]</sup> 150:4 <b>combination</b> <sup>[2]</sup> 69:1 92:7 <b>combined</b> <sup>[2]</sup> 174:3,4 <b>combines</b> <sup>[1]</sup> 164:2 <b>come</b> <sup>[17]</sup> 68:10 70:25 74:22 76:13,14 106:23 108:11 119:4 120:19 134:6,7,9,11 135:21 150:15 159:6 181:23 <b>comes</b> <sup>[22]</sup> 16:23 35:17,20 39:4 47:14 57:20 61:23 63:7 71:3 106:2 116:8 131:23
---	---	--	---	--

## Official - Subject to Final Review

<p>141:22 159:10,14 184:9 193:3 198:4 201:23 204:2, 8,9 Comet [1] 204:9 comfortably [1] 72:11 coming [3] 65:16 147:12 186:11 command [2] 58:11 62:2 commandeering [12] 46:3 53:9,12 63:2 66:13 81:12 86:21 97:23 188:19 189: 20,21 197:3 commands [7] 56:6 58:11 60:4,7,8,9,14 comment [3] 28:9 77:8 144:23 commentaries [1] 76:24 commerce [6] 13:12 14:2, 3 15:12,12,20 16:5,6 17:1 18:23 34:2,2,22,25 35:6,17, 22 36:5,7,12 38:22 40:11, 14 50:12 65:21 68:23 70:3, 9,12 71:18 77:1,7 78:3 79: 7,11,13,18 80:1,4,8,9,13 100:19 101:1,23 102:7,9, 15,18,24 103:5 104:5 106: 2 137:16,17 146:5 147:11, 17 159:6 161:11 181:4 committee [1] 100:23 common [15] 24:4 76:17 85:14 132:9 135:13,15,16 137:20 144:7,7 152:11 153:3 170:11 171:5 206:5 commonities [8] 31:6 32: 1,23 114:6,12 164:9 182: 20 183:7 community [16] 4:21 24:6 125:14 127:6 173:8 181: 20,21,25 182:1,11 183:5, 16 184:13 205:13,14,16 compared [1] 172:10 compares [1] 77:2 compelling [3] 12:23 46: 17,18 competence [1] 126:11 competent [4] 123:22,24 124:4,18 competing [3] 6:14 10:13 124:4 complain [1] 200:15 complaining [2] 38:20 41: 15 complaint [4] 7:7,10 36:18 186:4 complaints [2] 19:14 33: 11 complete [1] 73:11 completely [7] 85:10 112: 24 113:1 151:21 187:13 201:25 202:5 complex [1] 57:18 complications [1] 177:16 complicit [2] 59:1,25 comply [1] 57:12</p>	<p>complying [1] 199:19 component [18] 58:8,15 60:16 64:10 66:6 71:22 76: 12,18 80:11 84:7 85:19,19 96:1 98:5 113:1 154:11,12 205:24 components [8] 59:18 60: 4 69:24 70:17 72:10 96:16 98:20 142:13 compounded [1] 201:11 concede [5] 17:8 42:10 52: 23 53:1 206:15 conceded [5] 40:16 69:21 184:20 205:5 207:8 conceivable [1] 68:19 conceivably [1] 53:19 concentrated [2] 167:19 178:5 concept [2] 53:15 136:18 concern [7] 19:2 47:25 64: 16 110:19 132:11 134:20 150:14 concerned [7] 49:24 53:16 116:23 121:23 124:12 125: 1 160:2 concerning [1] 9:12 concerns [3] 50:2 100:6 145:24 conclude [1] 127:17 concludes [1] 206:19 concrete [1] 119:12 conditioned [1] 57:11 Condon [2] 190:12,18 conduct [2] 146:2 181:7 Confederation [6] 50:16 101:3,16 102:2 169:5 195: 3 confers [2] 15:19 137:5 confess [2] 37:24 196:15 confession [1] 98:9 confidence [1] 168:12 confident [1] 200:22 confronted [1] 106:21 confused [2] 33:18 49:23 confusion [1] 90:2 Congress [200] 9:20,21 13: 11 15:9 17:8,11,16,21 18: 18 22:13 24:1 29:23 30:5, 17 31:4,24 32:2,8,23 33:2, 4,20,22 34:1,20 36:22 37:3, 9,18,21 38:6,16,24,25 40: 20 47:24 48:6,16 49:21 50: 3,23 51:1 52:5,9,14,19 55:15 56:4 64:19,23,25 65: 6 68:12,14 69:10,14 70:5,5 71:2,14 72:2,9 73:5,19 74: 20 75:14 77:17,19 81:10, 18 82:8,16,24 86:19 87:21 88:19 89:3 90:4,13,16,20 91:11 94:2,5 95:5 98:15 105:13 106:19 107:5,8,22 108:7,18,20,20 109:6,13, 21,25 110:13,14,23 111:14, 19,22,25 113:9 114:2,14,</p>	<p>16 116:21,22 117:7 118:12, 18,24 119:7 120:20 124:9, 11,25,25 125:11 126:22 127:16 128:2,6 132:13 135:15 140:7,11,13,20 141: 5 142:7 145:4,9,25 146:20, 25 147:15,19 148:12 149:8 152:13 153:2 156:4,4,5,14 160:8,13,18 161:10,13,18, 25 162:8,14,23 163:3,10 164:24 165:3,19 167:2,7, 10,11,15,25 168:3,8,9,18 174:16 177:1,3,4,14,24 178:2 179:13,15 180:4,15, 20 181:3,6,13 182:9,11,14, 16,18 191:18,19 194:10 206:1 Congress's [59] 10:4,10 25:14 31:19,23 33:15 35:2 37:1 41:20 49:7,17 50:1, 21 65:9 72:11 73:13,15 80: 14 87:25 94:9 103:25 104: 3,20,24 105:10,14,23 106: 3,8,14 107:1 108:15 109:2, 19 111:23 115:18,22 127: 18,22 128:4 137:10,11 139: 9,16 140:17 141:24 145:11 146:12 147:3 150:3 157: 23 158:1 159:10 160:6,22 175:5 176:23 191:22 194: 18 congressional [4] 55:19 169:12 171:17 202:3 conjunction [4] 58:6 60:3 78:21 92:16 connection [8] 42:2 47:21 115:15 136:1 143:15 154: 24 157:2 207:15 connections [1] 183:4 consent [1] 40:7 consequences [3] 177:17 198:8,9 consider [5] 24:16,16 126: 12 163:17 177:22 consideration [4] 6:12 121:10 138:3 150:1 considerations [4] 10:25 120:19 198:23 204:25 considered [3] 103:25 143: 13 162:1 consistent [2] 49:20 56:20 consistently [1] 27:20 consolidated [1] 4:5 constantly [1] 17:24 constituency [1] 194:2 constituents [1] 128:8 constituted [1] 96:3 Constitution [32] 15:19 22: 2 32:7,15 50:5 54:8 63:14 64:23,24 65:6 70:19 75:16 81:21 92:15 96:15 98:17 99:22 100:3 101:7 102:7 104:5 106:20 144:18 159: 1 160:21 169:7 180:22,24,</p>	<p>25 181:1 194:19 195:1 Constitution's [1] 50:11 constitutional [15] 32:17 50:5 51:2,5,10 53:14 58:6, 17 63:15 74:17 94:18 104: 7 114:24 159:15 200:9 constitutionality [1] 163: 17 constitutionally [1] 199:5 constructing [1] 74:11 construction [1] 8:3 construed [1] 79:10 Consular [1] 136:7 contemporary [1] 147:21 context [11] 23:9 45:19 51: 24 54:21 110:12 125:15 146:8 156:3,14 168:17 196:11 context-specific [1] 146: 13 continent [1] 172:8 continue [1] 27:12 continued [4] 17:23 31:5 32:1,22 continuing [1] 30:19 contract [1] 72:14 contracting [1] 155:23 contracts [3] 110:2,15,17 contrast [1] 150:2 contributes [1] 87:10 control [4] 33:15 54:3 77:7 208:1 Convention [8] 8:16,23 9: 1,15 10:7 91:9 92:1,10 Convention-type [1] 37: 20 conversation [1] 89:14 convincing [2] 12:13 204: 23 copy [1] 6:7 core [18] 17:2 29:18 36:18, 21,25 74:18 76:12 98:1 104:23 105:22 106:10 151: 12,20 158:20 166:18 177: 11 179:11,19 Correct [22] 23:19 29:10 32:18 41:18 49:25 60:22 67:24 73:3 123:3,18,22 124:5 130:3 143:5,21 144: 4,11 151:22 157:17 192:8 200:5,8 cost [1] 61:25 costs [4] 32:3 56:9 57:25 62:5 coterminous [2] 61:2,6 Cougar [1] 168:22 couldn't [5] 37:16 99:16,18 132:13 200:12 Counsel [30] 6:25 7:19 8: 10 10:23 13:7 16:18 19:10, 12 23:4 33:10 36:6 55:9 64:12 66:9 68:20 71:10 77: 10 81:1 82:22 84:13 86:23 92:10 93:13 103:7 136:12</p>	<p>162:18 171:13 173:18 203: 11 208:6 counties [2] 167:17,20 countries [2] 136:8 137:12 country [8] 10:12 72:1 93: 25 136:9,15 153:14 164:21 199:3 counts [5] 35:19,20,23 47: 16 49:8 couple [19] 8:24 11:12,24 15:22 96:10 103:14 107: 11 116:4,5,8 119:20 120: 10 121:17 129:24 133:22 148:11 150:15 166:18 201: 9 course [20] 5:21 6:20 22: 14,15 37:18 47:6 52:2 55: 5 63:4 65:19 70:7 71:19 73:14 76:5 91:17,22 105: 18 161:15 173:1 187:1 COURT [121] 1:1 2:3 4:10, 19 6:6 8:18 11:12 12:1,8 19:6 20:12,17 21:9,15 22: 5 25:1 30:1 35:7 39:15 41: 14 42:10 45:18 46:10 49:3, 7 55:14,17 56:24 58:7 62: 16,18 63:11 64:5 65:20,23 66:2 67:5 68:1,1,8 69:25 70:4 71:1,24 72:14,19,24 73:19,22,25 74:3,20,22 76: 5,6 77:3 79:8 81:4,17 83: 12 84:3 85:7,13,25 94:7 95:4 103:12,13 104:11,16 105:4,11 106:6,25 108:10, 13,13 113:10 117:13 123: 13 125:3 126:16 138:25 141:10 146:4 150:16 155: 25 158:10 159:19 162:22 163:5 167:6,16,21 168:17, 21 171:8,8,21 178:20,25 185:23,25 186:21,23 187:1, 25 188:2 190:4,21 191:3, 17,20 195:6 202:1,1,2 203: 4 204:11,17,17 Court's [26] 5:18 14:1,7,9, 10 17:1 20:25 48:20 54:6 56:11 65:17 71:1 88:22 94: 8 105:9 113:8 124:14 141: 8 143:23 155:14 164:11,13 179:1 189:17 190:9 205: 10 courts [23] 9:11 15:3 20:5 41:19,22 52:18 56:3 62:21, 25 63:21 64:10 84:20,23 87:20,22 89:11 92:12 105: 3 163:1 164:20 165:14 167:1 205:2 courts' [1] 80:11 covered [2] 23:15 136:19 COVID [3] 111:15 177:13, 18 create [3] 90:1 165:3 187: 11 created [2] 146:2 189:10</p>
---	---	---	--	--

## Official - Subject to Final Review

<p><b>creates</b> <sup>[1]</sup> 189:19</p> <p><b>crimes</b> <sup>[4]</sup> 72:6,7 147:23, 23</p> <p><b>criminal</b> <sup>[3]</sup> 108:7 146:2 147:22</p> <p><b>criteria</b> <sup>[2]</sup> 123:6 163:22</p> <p><b>critical</b> <sup>[6]</sup> 30:19 94:18 139:15 164:6 182:8 203:9</p> <p><b>crosscut</b> <sup>[1]</sup> 195:1</p> <p><b>crystal</b> <sup>[1]</sup> 186:21</p> <p><b>cultural</b> <sup>[8]</sup> 132:9 135:17 153:3,8,15 172:9,14 193:1</p> <p><b>culturally</b> <sup>[1]</sup> 48:3</p> <p><b>cure</b> <sup>[1]</sup> 187:4</p> <p><b>curious</b> <sup>[3]</sup> 19:17 62:12 72:16</p> <p><b>current-day</b> <sup>[1]</sup> 28:5</p> <p><b>custodian</b> <sup>[1]</sup> 123:16</p> <p><b>custodians</b> <sup>[2]</sup> 123:25 124:5</p> <p><b>custody</b> <sup>[11]</sup> 8:13 10:13 39:17 55:16 56:2 82:21 99:5 138:21 139:3 163:6 167:24</p> <p><b>cut</b> <sup>[6]</sup> 57:1 142:5 145:3 146:12 198:15 199:8</p> <p><b>cutoff</b> <sup>[2]</sup> 192:7,10</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D.C</b> <sup>[4]</sup> 1:24 2:7,12,14</p> <p><b>damaging</b> <sup>[1]</sup> 127:6</p> <p><b>danger</b> <sup>[1]</sup> 97:14</p> <p><b>dates</b> <sup>[1]</sup> 194:19</p> <p><b>Dawes</b> <sup>[1]</sup> 181:11</p> <p><b>day</b> <sup>[3]</sup> 119:17 129:18,19</p> <p><b>de</b> <sup>[3]</sup> 20:9,24 21:1</p> <p><b>deal</b> <sup>[7]</sup> 28:17 89:12 98:15 100:10 109:7 128:6 185:16</p> <p><b>dealing</b> <sup>[11]</sup> 26:14 96:2 107:20 109:6,11 137:11,11,13 161:15 193:24 194:1</p> <p><b>deals</b> <sup>[1]</sup> 162:1</p> <p><b>DEB</b> <sup>[1]</sup> 1:15</p> <p><b>debate</b> <sup>[3]</sup> 166:17 170:19 202:15</p> <p><b>decades</b> <sup>[2]</sup> 74:5,5</p> <p><b>decide</b> <sup>[7]</sup> 48:14 87:23 105:19 112:12 175:22 197:5 202:24</p> <p><b>decided</b> <sup>[2]</sup> 52:20 111:19</p> <p><b>decides</b> <sup>[3]</sup> 47:15,15 149:9</p> <p><b>deciding</b> <sup>[3]</sup> 179:23 203:4, 6</p> <p><b>decision</b> <sup>[15]</sup> 12:8 17:1 20:25 29:19 48:7 49:6 92:13 124:14 127:19 130:13 141:8 143:23 160:13 204:18 205:10</p> <p><b>decisionmaking</b> <sup>[1]</sup> 164:2</p> <p><b>decisions</b> <sup>[8]</sup> 8:15 30:24 31:25 32:3 36:13 137:24 163:24 165:25</p> <p><b>declare</b> <sup>[1]</sup> 143:20</p>	<p><b>declares</b> <sup>[1]</sup> 161:18</p> <p><b>deem</b> <sup>[1]</sup> 90:7</p> <p><b>deep</b> <sup>[1]</sup> 5:13</p> <p><b>default</b> <sup>[2]</sup> 82:20 165:20</p> <p><b>defend</b> <sup>[6]</sup> 59:11 88:17 107:16 149:7,15 173:11</p> <p><b>defense</b> <sup>[1]</sup> 149:15</p> <p><b>defensible</b> <sup>[1]</sup> 178:9</p> <p><b>deference</b> <sup>[5]</sup> 106:16 107:1 114:2 161:3 162:16</p> <p><b>define</b> <sup>[2]</sup> 48:21 73:2</p> <p><b>defined</b> <sup>[2]</sup> 35:21 144:10</p> <p><b>defines</b> <sup>[3]</sup> 48:23 49:4 144:19</p> <p><b>defining</b> <sup>[1]</sup> 144:14</p> <p><b>definition</b> <sup>[3]</sup> 128:12 186:15 205:25</p> <p><b>Delaware</b> <sup>[1]</sup> 66:3</p> <p><b>delegated</b> <sup>[1]</sup> 29:24</p> <p><b>deliberate</b> <sup>[1]</sup> 147:18</p> <p><b>deliver</b> <sup>[1]</sup> 112:2</p> <p><b>delivering</b> <sup>[1]</sup> 111:23</p> <p><b>delivery</b> <sup>[1]</sup> 96:13</p> <p><b>demand</b> <sup>[1]</sup> 179:1</p> <p><b>demarkation</b> <sup>[1]</sup> 16:22</p> <p><b>demonstrate</b> <sup>[1]</sup> 64:8</p> <p><b>demonstrated</b> <sup>[1]</sup> 12:17</p> <p><b>Den</b> <sup>[1]</sup> 168:22</p> <p><b>denied</b> <sup>[1]</sup> 172:21</p> <p><b>denying</b> <sup>[1]</sup> 33:3</p> <p><b>Department</b> <sup>[4]</sup> 2:12 11:16 44:4,4</p> <p><b>depend</b> <sup>[2]</sup> 111:19 114:7</p> <p><b>depended</b> <sup>[1]</sup> 78:20</p> <p><b>dependency</b> <sup>[1]</sup> 104:16</p> <p><b>dependent</b> <sup>[5]</sup> 75:21 104:8 106:1 109:17 159:16</p> <p><b>depending</b> <sup>[2]</sup> 86:7 156:14</p> <p><b>depends</b> <sup>[4]</sup> 23:9 90:3 129:22 143:14</p> <p><b>deployment</b> <sup>[1]</sup> 168:1</p> <p><b>deprive</b> <sup>[1]</sup> 167:2</p> <p><b>deprives</b> <sup>[2]</sup> 4:14,14</p> <p><b>Deputy</b> <sup>[1]</sup> 2:11</p> <p><b>derives</b> <sup>[1]</sup> 104:11</p> <p><b>descend</b> <sup>[1]</sup> 137:25</p> <p><b>descent</b> <sup>[1]</sup> 144:6</p> <p><b>describe</b> <sup>[6]</sup> 16:21 39:13 76:9 101:22 102:23 118:3</p> <p><b>described</b> <sup>[12]</sup> 11:13 13:9 14:7 15:24 19:6 35:7 51:14 52:6 70:4 76:6 95:18 119:3</p> <p><b>describes</b> <sup>[3]</sup> 6:15 13:2 101:17</p> <p><b>describing</b> <sup>[7]</sup> 73:7 74:16 78:11,19 88:19 95:21 114:16</p> <p><b>description</b> <sup>[2]</sup> 72:19,23</p> <p><b>design</b> <sup>[3]</sup> 50:6 99:22 205:3</p> <p><b>designed</b> <sup>[2]</sup> 46:12 196:4</p> <p><b>desire</b> <sup>[5]</sup> 175:8,13 177:9 178:17,18</p>	<p><b>desires</b> <sup>[1]</sup> 129:7</p> <p><b>despite</b> <sup>[1]</sup> 176:10</p> <p><b>details</b> <sup>[2]</sup> 84:1 201:5</p> <p><b>detain</b> <sup>[1]</sup> 15:5</p> <p><b>determination</b> <sup>[8]</sup> 8:18 63:12 117:14 118:19 119:16 121:19,21 150:24</p> <p><b>determinations</b> <sup>[7]</sup> 83:13 84:4 99:6,7 119:16 121:13 164:4</p> <p><b>determine</b> <sup>[3]</sup> 58:2 64:6 117:17</p> <p><b>determined</b> <sup>[1]</sup> 125:8</p> <p><b>devastating</b> <sup>[1]</sup> 179:17</p> <p><b>dialogue</b> <sup>[1]</sup> 173:20</p> <p><b>dictate</b> <sup>[3]</sup> 18:13 20:12 76:14</p> <p><b>dictating</b> <sup>[1]</sup> 54:15</p> <p><b>die</b> <sup>[1]</sup> 88:7</p> <p><b>difference</b> <sup>[10]</sup> 23:5,21 24:13 25:7 26:18 91:21 130:7, 18 186:18 203:2</p> <p><b>differ</b> <sup>[24]</sup> 8:22 27:24 29:6,14 32:2 112:8 113:11 120:15 126:13 130:3,14 132:8 133:1,23 141:2,14 144:3 145:1 150:9 151:21 169:21 192:23 202:18 207:24</p> <p><b>differently</b> <sup>[5]</sup> 24:17 95:1 139:20 192:12 198:4</p> <p><b>differing</b> <sup>[1]</sup> 208:1</p> <p><b>differs</b> <sup>[1]</sup> 11:19</p> <p><b>difficult</b> <sup>[17]</sup> 29:2 94:16 107:15 108:5 138:25 148:17 149:7,14,20 154:10,10, 17 184:21,24 195:25 202:22 207:7</p> <p><b>difficulty</b> <sup>[2]</sup> 107:20 115:25</p> <p><b>dimension</b> <sup>[1]</sup> 206:22</p> <p><b>diminish</b> <sup>[1]</sup> 109:8</p> <p><b>diminished</b> <sup>[2]</sup> 104:14 140:9</p> <p><b>direct</b> <sup>[7]</sup> 45:16 65:7,10 68:19 99:13 137:13 160:18</p> <p><b>directed</b> <sup>[1]</sup> 46:16</p> <p><b>directly</b> <sup>[5]</sup> 39:9 167:7 174:23,25 207:4</p> <p><b>disagree</b> <sup>[5]</sup> 132:12 173:16 176:1,5 179:20</p> <p><b>disagreed</b> <sup>[1]</sup> 171:22</p> <p><b>disagreements</b> <sup>[1]</sup> 91:13</p> <p><b>disarray</b> <sup>[2]</sup> 165:14 205:2</p> <p><b>disaster</b> <sup>[1]</sup> 197:20</p> <p><b>disavowed</b> <sup>[1]</sup> 70:11</p> <p><b>discern</b> <sup>[2]</sup> 197:10,15</p> <p><b>discrete</b> <sup>[2]</sup> 105:10 132:8</p> <p><b>discrimination</b> <sup>[5]</sup> 10:19 94:23 96:22 146:22 147:8</p> <p><b>discriminatory</b> <sup>[3]</sup> 80:11 95:23 165:8</p> <p><b>discuss</b> <sup>[2]</sup> 60:5 62:12</p> <p><b>discussed</b> <sup>[2]</sup> 66:16 182:24</p>	<p><b>discussing</b> <sup>[1]</sup> 90:11</p> <p><b>disfavor</b> <sup>[1]</sup> 141:21</p> <p><b>disfavors</b> <sup>[2]</sup> 139:21 140:4</p> <p><b>disincentive</b> <sup>[2]</sup> 90:1 187:24</p> <p><b>disliked</b> <sup>[1]</sup> 141:11</p> <p><b>disparate</b> <sup>[1]</sup> 111:24</p> <p><b>displace</b> <sup>[1]</sup> 117:13</p> <p><b>displacement</b> <sup>[1]</sup> 39:25</p> <p><b>displaces</b> <sup>[2]</sup> 8:12 162:7</p> <p><b>displacing</b> <sup>[2]</sup> 49:7 104:25</p> <p><b>dispositive</b> <sup>[6]</sup> 13:6 129:6 135:18 138:19,24 168:2</p> <p><b>disproportionate</b> <sup>[1]</sup> 158:8</p> <p><b>disproportionately</b> <sup>[1]</sup> 189:23</p> <p><b>dispute</b> <sup>[5]</sup> 37:12 51:17 52:1,3 88:13</p> <p><b>disputes</b> <sup>[3]</sup> 37:9 85:3 91:7</p> <p><b>dissent</b> <sup>[1]</sup> 206:12</p> <p><b>distinction</b> <sup>[2]</sup> 28:25 206:18</p> <p><b>distinctions</b> <sup>[1]</sup> 163:19</p> <p><b>distinguishes</b> <sup>[1]</sup> 115:7</p> <p><b>distribute</b> <sup>[1]</sup> 112:12</p> <p><b>distributing</b> <sup>[1]</sup> 113:4</p> <p><b>distribution</b> <sup>[2]</sup> 57:2 177:20</p> <p><b>district</b> <sup>[1]</sup> 204:11</p> <p><b>divide</b> <sup>[1]</sup> 169:11</p> <p><b>divided</b> <sup>[1]</sup> 132:7</p> <p><b>dock</b> <sup>[2]</sup> 77:6 103:1</p> <p><b>doctrine</b> <sup>[8]</sup> 41:25 54:7 62:7 68:11,17 166:19,20 190:8</p> <p><b>doing</b> <sup>[12]</sup> 24:2 31:4,19 51:3 63:1 89:22 140:20 158:8 167:16,18 199:23 202:19</p> <p><b>DOJ</b> <sup>[1]</sup> 175:16</p> <p><b>domestic</b> <sup>[5]</sup> 69:9,17 71:11 93:1 94:7</p> <p><b>domestically</b> <sup>[2]</sup> 37:8 91:10</p> <p><b>domiciled</b> <sup>[1]</sup> 9:13</p> <p><b>done</b> <sup>[20]</sup> 38:21,21 39:10, 14 40:2 42:12 54:3 72:20 113:9 114:15 139:3 145:25 160:19 166:5,22,25 179:5 189:12,14 191:9</p> <p><b>door</b> <sup>[1]</sup> 89:20</p> <p><b>doubt</b> <sup>[7]</sup> 44:7 57:3 74:7 76:15 115:13,17 166:22</p> <p><b>down</b> <sup>[11]</sup> 47:13 78:6 100:23,25 134:16,19 158:10 159:19 171:17 188:12 191:21</p> <p><b>dozen</b> <sup>[1]</sup> 56:6</p> <p><b>draft</b> <sup>[1]</sup> 100:18</p> <p><b>draw</b> <sup>[3]</sup> 81:2 95:14 190:22</p> <p><b>drawing</b> <sup>[2]</sup> 28:25 95:17</p> <p><b>drawn</b> <sup>[1]</sup> 98:16</p> <p><b>draws</b> <sup>[2]</sup> 45:8 163:19</p>	<p><b>drew</b> <sup>[3]</sup> 22:8 28:23,24</p> <p><b>drinkers</b> <sup>[1]</sup> 187:24</p> <p><b>duplicated</b> <sup>[1]</sup> 9:10</p> <p><b>duty</b> <sup>[6]</sup> 104:9,10,18 111:25 166:24 205:18</p> <p><b>dying</b> <sup>[1]</sup> 122:25</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>each</b> <sup>[10]</sup> 4:23 56:7,8,9 73:20 91:19 96:6 135:10 172:7 204:7</p> <p><b>Earlier</b> <sup>[7]</sup> 42:17 74:8 81:9 148:12 152:11 168:13 169:19</p> <p><b>earliest</b> <sup>[1]</sup> 54:17</p> <p><b>early</b> <sup>[1]</sup> 53:11</p> <p><b>earth</b> <sup>[1]</sup> 180:18</p> <p><b>easier</b> <sup>[1]</sup> 155:1</p> <p><b>easily</b> <sup>[1]</sup> 90:24</p> <p><b>easy</b> <sup>[6]</sup> 62:8 107:23 158:15 164:17 177:2 179:12</p> <p><b>edges</b> <sup>[1]</sup> 81:11</p> <p><b>educate</b> <sup>[1]</sup> 150:3</p> <p><b>education</b> <sup>[7]</sup> 36:7,11 45:2 75:11 108:8 169:1 180:7</p> <p><b>EDWIN</b> <sup>[3]</sup> 2:11 3:10 103:9</p> <p><b>effect</b> <sup>[2]</sup> 46:8 49:11</p> <p><b>effectively</b> <sup>[2]</sup> 13:5 81:10</p> <p><b>effects</b> <sup>[3]</sup> 77:21 79:25 88:21</p> <p><b>effectuate</b> <sup>[3]</sup> 40:24 49:14 52:10</p> <p><b>effectuates</b> <sup>[1]</sup> 4:20</p> <p><b>efficient</b> <sup>[1]</sup> 96:12</p> <p><b>efforts</b> <sup>[26]</sup> 46:4,10 61:13, 19,21 62:9 66:21 67:2,8,13, 24 68:6 97:3 104:20 183:11 188:20,23 189:13,14,16 195:21 196:2,7 197:8,14 200:14</p> <p><b>either</b> <sup>[17]</sup> 10:2 18:11 62:4 71:9 72:11 80:3,3 85:6 109:14 137:4,25 139:8 141:20 151:17 155:11 156:17 191:8</p> <p><b>elaborate</b> <sup>[1]</sup> 15:22</p> <p><b>elaborated</b> <sup>[2]</sup> 14:9 53:2</p> <p><b>elements</b> <sup>[1]</sup> 93:18</p> <p><b>eleventh</b> <sup>[1]</sup> 5:5</p> <p><b>eligibility</b> <sup>[1]</sup> 63:12</p> <p><b>eligible</b> <sup>[4]</sup> 115:16 128:14, 22 144:1</p> <p><b>eliminates</b> <sup>[1]</sup> 186:14</p> <p><b>else's</b> <sup>[1]</sup> 59:1</p> <p><b>elsewhere</b> <sup>[2]</sup> 126:17 147:17</p> <p><b>embarrassments</b> <sup>[1]</sup> 101:19</p> <p><b>embedded</b> <sup>[2]</sup> 31:14 43:12</p> <p><b>emissions</b> <sup>[1]</sup> 57:1</p> <p><b>emphasize</b> <sup>[2]</sup> 163:1 182:13</p> <p><b>emphasized</b> <sup>[1]</sup> 71:2</p> <p><b>empirical</b> <sup>[1]</sup> 192:19</p>
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## Official - Subject to Final Review

<p><b>empirically</b> <sup>[1]</sup> 130:9  <b>employment</b> <sup>[2]</sup> 149:4 154:7  <b>enact</b> <sup>[4]</sup> 37:19 68:15 109:25 118:24  <b>enacted</b> <sup>[8]</sup> 68:14 103:14 116:21,22 118:12 119:8 147:22 162:23  <b>enacting</b> <sup>[1]</sup> 104:1  <b>enactment</b> <sup>[2]</sup> 103:21 105:8  <b>enclaves</b> <sup>[1]</sup> 85:9  <b>encompass</b> <sup>[1]</sup> 70:21  <b>encompassed</b> <sup>[1]</sup> 104:18  <b>encourage</b> <sup>[1]</sup> 89:23  <b>end</b> <sup>[3]</sup> 20:21 56:23 115:17  <b>ends</b> <sup>[1]</sup> 115:12  <b>energy</b> <sup>[1]</sup> 57:2  <b>enforce</b> <sup>[3]</sup> 56:6 59:25 86:11  <b>enforcement</b> <sup>[1]</sup> 86:10  <b>engage</b> <sup>[2]</sup> 127:22 197:13  <b>England</b> <sup>[1]</sup> 122:8  <b>English</b> <sup>[1]</sup> 113:23  <b>enjoy</b> <sup>[1]</sup> 21:5  <b>enjoy</b> <sup>[1]</sup> 206:7  <b>enjoys</b> <sup>[2]</sup> 69:10 73:10  <b>enormous</b> <sup>[1]</sup> 146:23  <b>enough</b> <sup>[11]</sup> 18:3 57:3 64:5,9 87:19,21 150:13 166:2 175:14 179:7 192:24  <b>enroll</b> <sup>[2]</sup> 26:4 31:11  <b>enrolled</b> <sup>[3]</sup> 128:23,24 137:21  <b>enrolling</b> <sup>[1]</sup> 43:20  <b>enrollment</b> <sup>[1]</sup> 40:6  <b>ensure</b> <sup>[1]</sup> 65:11  <b>ensuring</b> <sup>[3]</sup> 45:2 48:2 50:6  <b>entire</b> <sup>[2]</sup> 64:15 172:8  <b>Entirely</b> <sup>[2]</sup> 80:2 169:21  <b>entirety</b> <sup>[1]</sup> 57:4  <b>entities</b> <sup>[5]</sup> 27:22 48:2,9 181:2 189:25  <b>entitled</b> <sup>[2]</sup> 106:16 162:15  <b>entity</b> <sup>[4]</sup> 28:5 30:20,23 57:18  <b>enumerated</b> <sup>[7]</sup> 6:1,10 9:21 11:11 12:12 72:12 90:24  <b>environment</b> <sup>[1]</sup> 184:2  <b>environmental</b> <sup>[2]</sup> 77:20 79:24  <b>environments</b> <sup>[1]</sup> 87:9  <b>EPA</b> <sup>[1]</sup> 56:21  <b>equal</b> <sup>[61]</sup> 5:17 10:6 13:23 19:15,25 20:2 21:18 26:1,6 27:4 32:16 33:11 34:17 36:3 42:22 43:21 57:24 58:1,8,10,14,16 59:9,15 60:16,17 61:1,2 78:13,16 82:1 88:13,14 91:17 94:14,15 95:3,10,13 111:16 114:22 134:22 139:10,25 140:2</p>	<p>141:9,9 142:1 155:20 158:3 159:1 163:14 186:9,16 187:8,11 191:2,12 198:2 199:14 206:11  <b>equally</b> <sup>[3]</sup> 67:4,9,10  <b>era</b> <sup>[1]</sup> 89:18  <b>erroneous</b> <sup>[1]</sup> 187:3  <b>especially</b> <sup>[3]</sup> 50:15 62:4 80:10  <b>ESQ</b> <sup>[5]</sup> 3:3,7,10,13,16  <b>ESQUIRE</b> <sup>[2]</sup> 2:7,14  <b>essence</b> <sup>[1]</sup> 156:25  <b>essential</b> <sup>[9]</sup> 40:15,21 107:2 113:13,14,18,18,19,21  <b>essentially</b> <sup>[16]</sup> 9:10 10:20 58:10,14 62:23 63:11,17 64:5 71:15 72:3 73:10 76:8 90:6 97:7 100:14 147:9  <b>establish</b> <sup>[2]</sup> 56:4 204:20  <b>established</b> <sup>[3]</sup> 29:21 163:22 186:23  <b>establishing</b> <sup>[1]</sup> 161:21  <b>ET</b> <sup>[14]</sup> 1:3,10,21 2:8 3:5,18 4:8 8:20,21 99:9,9 109:10 161:14 203:16  <b>ether</b> <sup>[1]</sup> 184:14  <b>ethnicity</b> <sup>[1]</sup> 95:2  <b>Europeans</b> <sup>[1]</sup> 172:6  <b>evaluate</b> <sup>[1]</sup> 190:5  <b>even</b> <sup>[35]</sup> 5:13 8:21 18:8 19:15 28:1 43:8 52:19 53:19 55:18 56:4 58:23 64:6,9 72:14 78:1 87:12 97:21 101:23 103:3 123:21 133:17 139:20,21 142:14 143:10 150:25,25 151:20 173:15 175:11 189:3 190:1 202:12 206:24 207:21  <b>even-handed</b> <sup>[1]</sup> 190:5  <b>even-handedly</b> <sup>[2]</sup> 189:18 190:14  <b>evenhandedly</b> <sup>[1]</sup> 189:3  <b>event</b> <sup>[4]</sup> 163:18 190:1,20 205:4  <b>eventually</b> <sup>[1]</sup> 100:19  <b>EVERET</b> <sup>[6]</sup> 1:10 2:8 3:4,17 4:8 203:16  <b>everybody</b> <sup>[1]</sup> 187:1  <b>everyone</b> <sup>[1]</sup> 75:16  <b>everything</b> <sup>[7]</sup> 74:12,13 81:5 90:2 111:7,8 145:10  <b>everything's</b> <sup>[1]</sup> 150:11  <b>everywhere</b> <sup>[2]</sup> 14:15 178:14  <b>evidence</b> <sup>[12]</sup> 12:13,18 63:6 64:8 83:12 84:3 85:12 93:6 99:21 110:2 204:23 205:25  <b>evidence-based</b> <sup>[2]</sup> 164:3 166:13  <b>evidentiary</b> <sup>[2]</sup> 14:19,22  <b>eviscerate</b> <sup>[1]</sup> 187:13  <b>exact</b> <sup>[1]</sup> 173:2  <b>exactly</b> <sup>[10]</sup> 12:1 34:11 59:</p>	<p>23 69:3 92:9 168:4 169:6 173:8 177:4 184:12  <b>examining</b> <sup>[1]</sup> 110:11  <b>example</b> <sup>[30]</sup> 11:24 12:9 34:5 37:8 44:5 58:2 70:1,4 71:17 72:4 73:8 77:5,5 85:18 93:9 108:12 110:16 112:8 116:2 120:20 125:4 126:17 131:2 140:25 154:24 155:21 171:4 185:3 188:8 202:6  <b>examples</b> <sup>[2]</sup> 84:11 121:6  <b>exceed</b> <sup>[2]</sup> 13:11 81:20  <b>exceeds</b> <sup>[3]</sup> 41:20 56:1 139:8  <b>except</b> <sup>[3]</sup> 41:5 55:5 74:13  <b>exception</b> <sup>[11]</sup> 45:20 69:9 74:9 120:11,14 121:6 138:13 152:6 163:5 192:22 206:13  <b>exceptions</b> <sup>[2]</sup> 8:20 125:19  <b>exclude</b> <sup>[1]</sup> 145:13  <b>excluded</b> <sup>[1]</sup> 187:24  <b>excludes</b> <sup>[1]</sup> 6:12  <b>excluding</b> <sup>[3]</sup> 75:8 174:18,19  <b>exclusive</b> <sup>[5]</sup> 9:12 41:7 50:4 92:16 163:13  <b>excuses</b> <sup>[1]</sup> 87:10  <b>executive</b> <sup>[1]</sup> 63:13  <b>exemptions</b> <sup>[2]</sup> 108:12,14  <b>exercise</b> <sup>[16]</sup> 49:17 71:17,18,19 77:20 91:12 104:2 105:2,14 109:9 113:9 128:4 139:24 147:13 160:9 191:21  <b>exercised</b> <sup>[1]</sup> 69:11  <b>exercises</b> <sup>[1]</sup> 52:5  <b>exercising</b> <sup>[2]</sup> 68:12 100:8  <b>exhortation</b> <sup>[1]</sup> 74:18  <b>exist</b> <sup>[2]</sup> 152:12 167:22  <b>existed</b> <sup>[2]</sup> 186:3 187:5  <b>existence</b> <sup>[10]</sup> 17:23 18:2,6,11 30:19 33:3 49:13 52:3 104:23 207:22  <b>existing</b> <sup>[1]</sup> 41:25  <b>exists</b> <sup>[3]</sup> 52:24 73:12,14  <b>expanded</b> <sup>[2]</sup> 102:3 140:10  <b>expanding</b> <sup>[1]</sup> 18:24  <b>expense</b> <sup>[2]</sup> 65:1 99:24  <b>expenses</b> <sup>[1]</sup> 59:14  <b>experience</b> <sup>[2]</sup> 184:6,6  <b>experienced</b> <sup>[1]</sup> 184:7  <b>explain</b> <sup>[5]</sup> 28:12 43:25 130:21 133:1 170:20  <b>explained</b> <sup>[3]</sup> 4:19 22:6 165:23  <b>explaining</b> <sup>[1]</sup> 131:7  <b>explains</b> <sup>[1]</sup> 45:7  <b>explanation</b> <sup>[3]</sup> 56:18 98:9 131:15  <b>explicating</b> <sup>[1]</sup> 138:12</p>	<p><b>explicit</b> <sup>[1]</sup> 66:3  <b>explicitly</b> <sup>[1]</sup> 98:16  <b>express</b> <sup>[6]</sup> 61:23 138:8 158:13,13 166:2 192:24  <b>expressed</b> <sup>[1]</sup> 155:25  <b>expressly</b> <sup>[2]</sup> 57:11 156:16  <b>extend</b> <sup>[5]</sup> 17:3 36:12 52:17 73:24 74:21  <b>extended</b> <sup>[14]</sup> 29:3 45:19 116:7 117:10 119:7 120:4,4 125:12 126:23 127:4 153:6,7 162:10 190:7  <b>extending</b> <sup>[3]</sup> 18:24 72:4,5  <b>extensive</b> <sup>[1]</sup> 162:15  <b>extent</b> <sup>[7]</sup> 10:24 35:15 43:3 55:5 56:15 88:18 159:25  <b>external</b> <sup>[2]</sup> 158:3,25  <b>extinction</b> <sup>[1]</sup> 52:21  <b>extract</b> <sup>[1]</sup> 111:10  <b>extraordinarily</b> <sup>[1]</sup> 184:21  <b>extraordinary</b> <sup>[3]</sup> 12:25 59:24 87:3  <b>extremely</b> <sup>[1]</sup> 60:4</p> <hr/> <p><b>F</b></p> <p><b>face</b> <sup>[1]</sup> 105:5  <b>facial</b> <sup>[14]</sup> 129:17 139:5 163:15 171:1,15 172:4,20 184:24 193:9 201:7,16 202:2,20 203:6  <b>facially</b> <sup>[2]</sup> 42:6 191:21  <b>facilitates</b> <sup>[1]</sup> 164:5  <b>fact</b> <sup>[43]</sup> 16:3 20:23 22:2 30:21 31:10 37:5 39:14,18 56:22,25 57:15,25 61:6,24 62:19 72:19 76:18 82:8 88:20 89:13 91:2 92:25 93:16 94:1 98:4,7 104:2,12 110:4 119:5 135:21 137:15 138:21 150:4 160:14 166:25 176:11 184:19 186:1,6 187:2 188:7 206:10  <b>fact-specific</b> <sup>[1]</sup> 138:22  <b>facto</b> <sup>[3]</sup> 20:9,24 21:2  <b>factor</b> <sup>[2]</sup> 60:12 138:16  <b>factors</b> <sup>[8]</sup> 6:5 11:11 12:12,17,20 121:10 162:9 177:16  <b>facts</b> <sup>[2]</sup> 129:2 202:13  <b>failing</b> <sup>[1]</sup> 125:12  <b>fails</b> <sup>[1]</sup> 155:8  <b>Fair</b> <sup>[5]</sup> 42:5 170:18,19 193:20 194:23  <b>fairly</b> <sup>[1]</sup> 45:16  <b>faith</b> <sup>[1]</sup> 117:3  <b>fall</b> <sup>[6]</sup> 61:15 77:18 109:2 146:17,19 147:1  <b>fallen</b> <sup>[1]</sup> 12:15  <b>falls</b> <sup>[6]</sup> 40:19 46:22,25 47:4 72:10 80:1  <b>familiar</b> <sup>[5]</sup> 37:25 38:4 113:21 164:19 184:2  <b>families</b> <sup>[21]</sup> 4:18 5:2,2 6:14 61:23 103:17 124:15 127:4,4 130:2,2 132:14,15,</p>	<p>15,16 162:24 164:6,7,8 182:20 203:23  <b>family</b> <sup>[40]</sup> 5:15,16 6:6 18:10 20:12 36:17,19,23 37:7 39:20 41:25 46:13 47:20 68:25 91:2,8 104:21 116:7 117:18 119:6,23 120:4,4 122:1,2 125:12 126:23 130:15 133:11 138:20 153:7 162:10,11,25 164:20 166:10 167:1 172:21 191:10 196:5  <b>far</b> <sup>[9]</sup> 13:11 18:14 41:20 55:17 56:1 64:8 75:15 156:25 187:3  <b>farther</b> <sup>[2]</sup> 62:14 155:3  <b>father</b> <sup>[1]</sup> 133:18  <b>Fed</b> <sup>[1]</sup> 48:4  <b>federal</b> <sup>[67]</sup> 2:13 3:11 4:11,20 6:7,8 15:4 16:10,12 20:5,11,16 26:3 29:4 37:6 39:19 47:24 48:4 50:7,13 52:15 53:20 54:2,15 56:8 58:8,11,22 60:9,15 63:1 64:1,1,25 77:13 84:22 85:9 91:6 92:16,25 93:16 97:22 99:12,23 100:1,4,8 101:8 103:10 112:12 115:8 127:12 147:10 148:14 149:4 159:13 163:8,13,18,21 168:4,14 176:18,25 188:5 200:17 205:12  <b>Federalist</b> <sup>[3]</sup> 101:12,14,25  <b>federally</b> <sup>[9]</sup> 44:11 95:25 170:9,10,14 174:17 175:11,12 176:19  <b>federally-recognized</b> <sup>[3]</sup> 178:3,12 181:14  <b>feel</b> <sup>[2]</sup> 18:15 153:11  <b>feelings</b> <sup>[1]</sup> 181:22  <b>fell</b> <sup>[1]</sup> 94:8  <b>few</b> <sup>[5]</sup> 60:3 69:7 81:11 87:5 145:1  <b>fewer</b> <sup>[1]</sup> 4:22  <b>Fifteenth</b> <sup>[1]</sup> 27:24  <b>Fifth</b> <sup>[9]</sup> 10:15 43:18 58:9,12 59:8 60:15 61:1,4 186:4  <b>figure</b> <sup>[5]</sup> 43:23 53:13 61:11 70:14 198:24  <b>figuring</b> <sup>[1]</sup> 119:10  <b>final</b> <sup>[5]</sup> 61:17,20 67:15 204:5,6  <b>finally</b> <sup>[4]</sup> 6:14 57:23 90:25 191:16  <b>financial</b> <sup>[1]</sup> 122:1  <b>find</b> <sup>[9]</sup> 73:18,21 94:16 142:16 167:5,9 171:13,14 178:4  <b>finding</b> <sup>[3]</sup> 116:19 154:16 168:3  <b>findings</b> <sup>[3]</sup> 177:5 179:13,15</p>
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## Official - Subject to Final Review

<p><b>Fine</b> [4] 21:21 83:6 85:10 107:23</p> <p><b>finish</b> [8] 9:8 84:10 124:20, 24 153:25 174:23 179:4 198:16</p> <p><b>finished</b> [1] 126:3</p> <p><b>finishing</b> [1] 174:24</p> <p><b>First</b> [57] 8:25 15:18 18:7 19:14, 17 20:23 30:15 48:17, 20 53:12 54:22 55:20 56:20 59:19 61:8 63:5 69:7 70:1 71:21 74:16 78:9 79:3, 6, 15 84:6 88:3 91:16 95:16, 17 97:19 100:17 101:12 115:5 117:20 120:3 122:8, 23 130:10 131:10 134:6, 17 139:23 146:18 157:5, 5 163:3 166:18 172:1 178:4 180:15 185:21 188:25 192:2 194:20 199:2 201:4, 24</p> <p><b>Fisher</b> [2] 28:15, 20</p> <p><b>fishing</b> [2] 28:19 168:22</p> <p><b>fit</b> [1] 180:8</p> <p><b>fits</b> [1] 135:22</p> <p><b>fitting</b> [1] 19:3</p> <p><b>five</b> [4] 6:1, 5 12:17, 20</p> <p><b>fix</b> [1] 90:23</p> <p><b>flaw</b> [1] 44:18</p> <p><b>flexibility</b> [3] 152:6 164:3 166:14</p> <p><b>flip</b> [1] 202:9</p> <p><b>floated</b> [1] 13:14</p> <p><b>Florida</b> [1] 172:11</p> <p><b>flourishment</b> [1] 31:5</p> <p><b>flouts</b> [1] 5:16</p> <p><b>focus</b> [3] 13:23 46:4 95:13</p> <p><b>focused</b> [3] 162:1 170:17 201:8</p> <p><b>focuses</b> [1] 91:1</p> <p><b>foists</b> [2] 56:8 62:5</p> <p><b>follow</b> [6] 86:11 112:10 129:25 137:23 143:5 199:12</p> <p><b>followed</b> [2] 95:19 114:1</p> <p><b>following</b> [3] 122:5 130:10 204:21</p> <p><b>food</b> [2] 171:24, 24</p> <p><b>Footnote</b> [4] 11:14 189:1, 2 204:10</p> <p><b>forbidding</b> [2] 70:7, 8</p> <p><b>force</b> [1] 86:20</p> <p><b>forcible</b> [1] 40:6</p> <p><b>forcibly</b> [1] 26:4</p> <p><b>foreclosing</b> [1] 72:6</p> <p><b>foreign</b> [13] 10:10, 12, 15 37:13 77:5 83:14 102:25 122:9, 10 137:12, 12, 17 181:5</p> <p><b>foremost</b> [1] 56:20</p> <p><b>Forget</b> [2] 36:2 178:20</p> <p><b>forgiving</b> [1] 88:23</p> <p><b>form</b> [1] 17:6</p> <p><b>formal</b> [1] 145:17</p> <p><b>formed</b> [1] 182:25</p>	<p><b>formula</b> [1] 57:18</p> <p><b>formulation</b> [1] 109:16</p> <p><b>formulations</b> [1] 113:11</p> <p><b>forth</b> [6] 85:12 92:13 165:10 176:20 189:7 204:22</p> <p><b>Forty-Three</b> [1] 168:19</p> <p><b>forward</b> [3] 116:8 131:24 168:9</p> <p><b>foster</b> [25] 4:13, 23, 25 6:23, 23 46:8 97:10, 17 103:18 105:2 131:23 166:4 169:20 197:9, 18 198:4, 9 200:4, 6, 10, 12 203:24 204:1, 2, 12</p> <p><b>foster-cared</b> [1] 89:25</p> <p><b>found</b> [6] 54:17 165:7 182:9, 11, 14, 16</p> <p><b>Foundation</b> [1] 119:2</p> <p><b>founding</b> [4] 25:18 75:16 153:13 163:6</p> <p><b>four</b> [5] 5:15 18:6 42:19, 23 177:3</p> <p><b>four-and-a-half</b> [1] 5:8</p> <p><b>Fourteenth</b> [2] 58:9 61:5</p> <p><b>fourth</b> [1] 43:11</p> <p><b>framed</b> [1] 174:13</p> <p><b>framers</b> [2] 147:19 160:5</p> <p><b>framers'</b> [1] 147:15</p> <p><b>framework</b> [3] 118:25 125:9 162:4</p> <p><b>frankly</b> [2] 108:4 148:24</p> <p><b>free</b> [2] 82:8 165:16</p> <p><b>free-floating</b> [2] 125:2 165:16</p> <p><b>free-form</b> [1] 125:1</p> <p><b>friend</b> [2] 193:4 205:1</p> <p><b>friends</b> [5] 76:25 88:16 101:13 179:21 183:4</p> <p><b>fugitives</b> [1] 64:1</p> <p><b>fulfill</b> [1] 159:20</p> <p><b>fulfillment</b> [6] 105:23 106:8 140:16 141:24 175:5 176:22</p> <p><b>full</b> [3] 89:11, 18 91:17</p> <p><b>fully</b> [1] 54:9</p> <p><b>function</b> [1] 80:3</p> <p><b>functionally</b> [1] 85:9</p> <p><b>functioning</b> [1] 30:17</p> <p><b>fundamental</b> [9] 16:2 43:12 47:13 91:21 94:17, 17, 25 126:20, 23</p> <p><b>funds</b> [1] 150:3</p> <p><b>fungible</b> [3] 134:25 135:7 170:2</p> <p><b>furnish</b> [3] 111:19 114:5 123:5</p> <p><b>furnished</b> [2] 103:21 145:21</p> <p><b>furnishes</b> [1] 145:15</p> <p><b>furnishing</b> [2] 114:3 115:13</p> <p><b>Further</b> [14] 6:12 25:11 29:23 30:9 31:13 55:3 73:24 74:21 100:15, 25 107:9, 13 136:13 142:10</p>	<p><b>furthering</b> [1] 110:8</p> <p><b>future</b> [1] 204:2</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>Gallons</b> [1] 168:20</p> <p><b>Gas</b> [1] 65:25</p> <p><b>gave</b> [3] 99:23 100:3 104:17</p> <p><b>General</b> [20] 2:9, 11 49:20 55:10 56:12 61:9 64:21 72:15 77:9 82:12 86:25 97:2 114:5 145:2, 4 146:25 147:11 197:1, 7 198:12</p> <p><b>generalized</b> [1] 64:10</p> <p><b>generally</b> [1] 69:9</p> <p><b>generis</b> [2] 25:2 45:21</p> <p><b>geographic</b> [4] 71:21 85:18 112:25 158:24</p> <p><b>geographically</b> [1] 71:20</p> <p><b>geography</b> [3] 16:20 71:16 90:3</p> <p><b>Georgia</b> [2] 187:14, 20</p> <p><b>GERSHENGORN</b> [74] 2:14 3:13 162:19, 21 164:15, 22 169:23 170:3, 6, 8 172:12 174:7, 10, 22 175:2 176:4, 9, 12 177:21 178:15 179:5, 9, 25 180:3, 9, 12 181:16 182:5, 7 183:18, 24 184:3, 18 185:19 186:20 188:22 190:3 191:4, 7, 23 192:9, 14, 17 193:9, 12, 15, 18 194:7, 24 195:6, 10 196:9, 12, 15, 18 197:19, 23 198:6, 11, 14, 21, 25 199:10, 13, 18, 20 200:2, 5, 8, 19 201:10, 17, 20, 23</p> <p><b>gets</b> [2] 65:7 184:14</p> <p><b>getting</b> [3] 65:5 93:16 177:18</p> <p><b>Gibbons</b> [3] 77:4 102:20, 22</p> <p><b>Ginsburg's</b> [1] 206:12</p> <p><b>give</b> [17] 64:7, 23, 25 87:1 89:11 91:3 130:13 131:14 132:13 133:21 137:8 147:19 149:11 163:11 171:23 175:10 178:25</p> <p><b>given</b> [22] 31:2, 3, 3 62:19, 21 99:18 100:9 114:2 120:21 129:7 143:18 160:9, 20, 20, 24 172:22 195:1, 3, 4 199:1 200:21 205:20</p> <p><b>gives</b> [1] 8:19</p> <p><b>giving</b> [6] 121:5 129:3 157:1 160:11, 17 178:2</p> <p><b>glad</b> [1] 182:7</p> <p><b>gloss</b> [1] 99:20</p> <p><b>gold</b> [3] 164:10 166:11 182:18</p> <p><b>GORSUCH</b> [108] 16:18 19:10, 12, 20, 23 20:2, 8, 11, 16, 20 21:4, 8, 12, 18, 21 22:12, 15, 20 23:1 33:9, 10, 23, 25 34:4, 14, 16, 19, 24 35:9, 12,</p>	<p>19, 23 36:2, 6, 14, 21 37:5, 22 38:2, 12, 19 39:4, 18 40:9, 13 41:10, 21 42:3, 5, 11, 13 64:12 66:9, 11, 19, 25 67:16, 21 68:5, 9, 20 69:13, 16, 19 70:10, 20, 23 71:8 77:10 78:15, 23 79:4, 9, 12, 16, 20, 23 80:5, 12, 15, 20, 24 81:8, 24 82:5 89:1, 2, 9, 12 90:18, 22, 25 91:24 92:9, 19, 24 93:12, 19, 23 94:10 108:9 148:4 188:17, 18 189:22 190:25 191:5, 16</p> <p><b>Gorsuch's</b> [1] 31:21</p> <p><b>got</b> [5] 21:22 42:20 68:5 92:2 157:17</p> <p><b>gotten</b> [2] 111:9 184:8</p> <p><b>govern</b> [6] 17:13 28:20 39:3 51:7 207:5, 19</p> <p><b>governance</b> [3] 17:19 25:4 73:9</p> <p><b>governed</b> [1] 129:13</p> <p><b>government</b> [62] 4:11 6:3 10:22 11:13 16:6, 10, 10 24:10 26:3 29:4 37:6 39:19 44:22 46:14, 17 50:7, 14 51:12 53:21 54:2 58:12 60:10, 15 65:1 71:5 73:10 84:23 91:6 92:25 96:12 97:5, 23 99:12, 23 100:1, 1, 4, 8 101:9 104:13 112:12 115:8 127:12 142:19, 20 159:14 163:8, 21 168:15 175:13, 17 176:18 188:6 197:3 200:18 205:4, 8, 14 206:9, 15, 24 207:16</p> <p><b>government's</b> [6] 16:12 51:8 52:15 54:15 77:14 147:10</p> <p><b>government-to-govern</b> <b>ment</b> [2] 51:9 135:11</p> <p><b>government-wide</b> [1] 176:25</p> <p><b>governmental</b> [2] 40:17 109:9</p> <p><b>governments</b> [9] 51:12 55:25 63:21 72:3, 4 136:6 137:18 145:8, 8</p> <p><b>grab</b> [2] 136:3, 3</p> <p><b>grandmother</b> [1] 202:17</p> <p><b>grant</b> [1] 148:13</p> <p><b>granted</b> [2] 7:5, 10</p> <p><b>granting</b> [1] 169:20</p> <p><b>gratuitously</b> [1] 141:5</p> <p><b>gravely</b> [1] 105:8</p> <p><b>great</b> [9] 94:19 106:16 107:20 109:7 129:7 132:5, 7 161:3 162:15</p> <p><b>greater</b> [2] 51:21 152:6</p> <p><b>greatly</b> [1] 155:18</p> <p><b>grip</b> [1] 46:5</p> <p><b>ground</b> [7] 6:9 12:16 46:24 173:4 196:1 197:21 204:16</p> <p><b>grounded</b> [2] 104:4, 6</p>	<p><b>grounds</b> [2] 21:16 63:9</p> <p><b>group</b> [3] 171:25 183:3 193:4</p> <p><b>groups</b> [3] 102:17, 19 155:24</p> <p><b>growing</b> [1] 153:16</p> <p><b>guardianship</b> [1] 76:6</p> <p><b>guess</b> [16] 15:16 19:17 28:6 29:13 31:1 40:18 48:18 49:19 73:17 113:5 114:8 119:9 134:19 160:10 198:13, 23</p> <p><b>guides</b> [1] 8:14</p> <p><b>gun</b> [1] 205:25</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>HAALAND</b> [2] 1:15 4:4</p> <p><b>habitual</b> [2] 9:2, 9</p> <p><b>Hague</b> [10] 8:16, 23, 25 9:15 10:7 37:20 91:9, 16, 25 92:10</p> <p><b>half</b> [2] 19:14 192:3</p> <p><b>Halley's</b> [1] 204:9</p> <p><b>hand</b> [4] 27:18 94:19, 24, 25</p> <p><b>handling</b> [1] 99:5</p> <p><b>happen</b> [1] 25:8</p> <p><b>happened</b> [3] 171:12 191:6 202:18</p> <p><b>happening</b> [6] 5:6 101:5 122:18 173:4 185:1, 5</p> <p><b>happens</b> [13] 6:6, 9 16:7 23:7, 23 24:13 35:2 121:3 128:25 129:21 178:13 196:1 204:13</p> <p><b>happenstance</b> [1] 90:3</p> <p><b>happy</b> [5] 62:11 100:16 164:11, 15 176:15</p> <p><b>hard</b> [10] 107:25 142:16 153:24 158:9 159:18 167:5, 9 178:24 198:15 199:4</p> <p><b>harder</b> [8] 28:4 154:4 173:25 174:2 176:3, 3, 5 178:16</p> <p><b>harm</b> [4] 160:24 181:20, 24 182:21</p> <p><b>harmful</b> [3] 140:15 141:4, 5</p> <p><b>harming</b> [1] 109:23</p> <p><b>harms</b> [1] 103:15</p> <p><b>Hawaii</b> [4] 29:24 30:3, 4 207:10</p> <p><b>Hawaiian</b> [1] 30:12</p> <p><b>Hawaiians</b> [2] 28:4 29:22</p> <p><b>head</b> [1] 5:3</p> <p><b>health</b> [8] 75:11 79:20 98:1, 2 111:20 145:20 163:7 168:24</p> <p><b>healthcare</b> [16] 35:3, 13, 19, 23 36:7 77:16 79:1, 9, 13, 21 108:8 111:23 115:16 145:15 178:7 180:7</p> <p><b>hear</b> [5] 4:3 19:15 20:14 59:2 176:13</p> <p><b>heard</b> [10] 19:14 67:2 68:22, 23, 24 145:1 187:9 189:22 205:7, 17</p>
--	---	---	---	---



## Official - Subject to Final Review

<p><b>hearing</b> [2] 47:18 173:3  <b>hearings</b> [1] 162:15  <b>heart</b> [4] 33:12 62:1 132:11 134:20  <b>heartland</b> [3] 35:17,21 62:6  <b>heavily</b> [1] 93:1  <b>held</b> [6] 22:16 30:4 41:22, 24 58:7 207:10  <b>help</b> [9] 100:5 108:2 149:9 175:8,14,22 178:18 180:21 201:15  <b>helping</b> [2] 179:6,7  <b>helps</b> [1] 61:18  <b>hereby</b> [1] 161:18  <b>heritage</b> [1] 153:13  <b>hides</b> [1] 62:4  <b>hierarchy</b> [1] 4:16  <b>highlighting</b> [1] 96:23  <b>hint</b> [1] 203:18  <b>hiring</b> [6] 22:19 24:24 25:2 29:3 44:2 148:13  <b>historians</b> [2] 101:5 102:8  <b>historical</b> [5] 63:6 64:7 76:22 99:9 100:13  <b>historically</b> [3] 39:20 99:22 145:25  <b>history</b> [16] 17:15 27:13 39:11 42:19 47:23 50:4 93:3, 17,25 94:22 144:8 160:12 161:6 177:5 194:8 195:3  <b>holding</b> [2] 42:6 207:1  <b>holds</b> [1] 101:12  <b>holistic</b> [1] 11:6  <b>Holiday</b> [8] 34:14,14,16 127:19 146:1 155:15 161:4 168:19  <b>Holyfield</b> [4] 4:19 103:13 143:23 205:11  <b>home</b> [3] 183:9,14,16  <b>homes</b> [4] 4:23,25 99:8 103:19  <b>Homesteading</b> [1] 63:20  <b>honest</b> [1] 201:11  <b>honestly</b> [4] 107:19 111:6, 12 202:12  <b>Honor</b> [99] 7:2,6,23 8:9,25 9:8,24 10:14 11:5 13:17, 24 15:15 16:25 19:5 20:19, 22 22:5,14 23:8,19,25 24:22 25:20 26:17 29:17 31:7, 14 32:7 36:20 41:18 44:14 45:7 52:12,25 54:5,24 56:19 59:3,19 60:2,25 62:12, 18 65:14 69:6,15,18,23 70:16 71:13 74:15 75:23 78:8, 19 79:6,22 80:9 81:22 82:7 83:9 85:4,16 88:2,12 89:5 91:16 93:15,22 95:15 98:19 165:9 169:24 170:3,6 172:12 174:10 175:20 176:13,16 177:21 179:10 180:13 182:8 183:24 184:5,19 185:19 186:21 187:7 190:</p>	<p>4 191:10 192:14 193:10 194:16 196:12 197:19,24 198:15 199:1  <b>Honor's</b> [1] 172:17  <b>Honors</b> [1] 173:16  <b>hoping</b> [1] 173:9  <b>hospitals</b> [1] 178:7  <b>hour</b> [1] 5:5  <b>hours</b> [1] 202:23  <b>House</b> [2] 24:4 206:3  <b>housing</b> [4] 122:2 168:25, 25 180:7  <b>however</b> [2] 56:5 76:17  <b>huge</b> [3] 77:12 122:25 127:2  <b>human</b> [1] 43:15  <b>hundred</b> [1] 141:1  <b>hundreds</b> [2] 4:24 192:4  <b>hurts</b> [1] 58:24  <b>hypo</b> [4] 171:10 173:12 177:22 184:23  <b>hypos</b> [3] 176:13,16 178:24  <b>hypothesize</b> [1] 138:22  <b>hypothetical</b> [13] 45:12,23 110:11 112:16 119:13,13 120:7,24 129:3 133:17 136:22 177:13 203:22  <b>hypotheticals</b> [9] 43:24 148:12 154:5,15 156:21 173:23 202:12,25 207:6</p> <p style="text-align: center;"><b>I</b></p> <p><b>IAN</b> [3] 2:14 3:13 162:19  <b>ICWA</b> [86] 5:3,5 10:3 11:3 17:18 19:9 38:7 41:3,15, 19 42:6 47:23,25 56:1,6,8, 23 57:12 61:21 63:5 66:15 81:13 87:6,23,24 88:21 89:3 91:23,23 96:17,20 103:3, 14,21 104:1,2,21 105:5 107:9 116:22 118:13,18 119:5 120:1 121:19,23 125:10 128:10,21 129:13, 15 131:3,20 134:2 136:20, 25 138:10 142:12,16 143:1 144:1 156:20 160:13 161:7 162:23 163:18,25 164:9, 18,23 166:5,11 168:5 173:9 179:12 181:12 182:9,11, 17,23 183:6,9 199:11 200:13 201:5 207:15  <b>ICWA's</b> [2] 6:17,22  <b>idea</b> [6] 32:20 98:6 101:25 135:6 139:6 141:2  <b>identifiable</b> [1] 78:21  <b>identified</b> [4] 114:21 135:22 167:6,21  <b>identify</b> [3] 158:16 171:10 172:10  <b>identifying</b> [2] 24:3 206:4  <b>identity</b> [1] 154:12  <b>ignorance</b> [1] 201:12  <b>IGRA</b> [1] 181:13</p>	<p><b>II</b> [4] 2:9 3:7 55:11 92:17  <b>illegally</b> [1] 166:5  <b>imagine</b> [3] 31:1 135:2 197:12  <b>imagining</b> [1] 195:25  <b>immediate</b> [1] 119:6  <b>immediately</b> [1] 95:19  <b>immigration</b> [1] 86:11  <b>immunity</b> [5] 65:23 72:5 73:12 158:4 159:3  <b>impact</b> [1] 111:24  <b>impermissible</b> [2] 33:5 189:20  <b>implement</b> [4] 37:19 56:23 58:1 59:21  <b>implementation</b> [3] 7:18 70:2 105:25  <b>implementing</b> [3] 55:20 57:13 118:14  <b>implements</b> [4] 21:2,16 61:3 162:12  <b>implications</b> [1] 201:15  <b>implicitly</b> [1] 98:16  <b>implied</b> [1] 165:1  <b>import</b> [1] 146:15  <b>important</b> [26] 28:1 43:22 45:14 48:8 106:18 126:25 128:9 129:16 130:11 138:3,17 140:19,23 144:9,12, 13 146:11 150:1 153:14 156:3 165:11 182:1,10,22 194:17 201:24  <b>impose</b> [1] 200:18  <b>imposed</b> [1] 125:5  <b>imposes</b> [3] 58:13 61:14 176:18  <b>imposing</b> [1] 105:1  <b>improper</b> [1] 40:3  <b>Improvement</b> [1] 168:24  <b>include</b> [5] 7:11 40:15 75:9 112:20 120:5  <b>included</b> [1] 102:9  <b>includes</b> [2] 36:7 96:17  <b>including</b> [6] 26:1 82:20 104:5 130:2 133:4 148:8  <b>incorporated</b> [1] 11:2  <b>incorporates</b> [2] 163:22 164:18  <b>incorrect</b> [1] 186:10  <b>incur</b> [1] 61:24  <b>indeed</b> [2] 163:10 191:13  <b>Indian</b> [188] 4:13,14,21,21, 24 9:18 11:24 13:8 14:2, 20 15:5,10 17:23,25 19:2 23:7,10,24 24:6,14 26:24 28:18 29:23 30:2,13 32:1, 22 34:2,3,6 38:21 40:6,15, 21,22,25 41:25 43:9 44:8, 17 45:1,21 46:13 47:16,17, 21 49:18 50:2,12,23 51:1, 15,22,25 52:16,17 53:22 54:4,21 55:6,19,24 58:3 61:23 64:22 65:2,5,12,12, 21 71:6,6,7 72:1,3 75:12</p>	<p>77:9 78:20 85:7,13 87:7, 11 89:15,20,21,24 90:1,8,9, 10,12 93:17 94:21,21 95:25 96:2,8 100:2,19,22,24 101:1 102:4 103:17 104:3, 5,7 105:9 106:2 107:10 109:10 110:3,5,15 115:16 116:4,5 122:22 127:2 128:12,21 130:2 133:3,3 134:25 136:25 137:16 138:9 142:14 143:2 144:2,16,18 145:14,20,23 147:11,17,20 148:23,25 154:19 157:23 159:6 160:7,24 161:1,20 162:13,23 163:7,11 166:23 168:14,24,24 169:1 171:5 172:23 175:11,18 177:14 178:3 179:17 181:11,12 183:22 186:15 189:11 191:18,22 193:25 194:8,12 196:5 197:11 198:3 199:8 204:7,11 205:13,13,15,15,20, 24 207:20 208:4  <b>Indian-specific</b> [1] 181:10  <b>Indians</b> [91] 14:14 15:1,13 19:8 24:25 25:15,16 26:4 28:20 29:7 34:23 35:3,13 36:23 37:4 43:6 44:2,13, 20,23 45:3 48:24 55:23 68:13,16 75:4,18 76:4,21 78:22 85:3 98:16 99:4,13 100:10 105:24 106:5 109:14 110:9,17 111:14 112:1,13, 25 114:10 115:14 121:16 127:25 139:20 140:5 141:21 144:19 145:16 146:4,6, 9 147:24,24,25 148:13 149:12 150:4 154:10 159:21 160:9 161:11,17 163:4 166:21 167:8,11,17,19 168:12,15,19 175:6,8,23 176:23 177:10,14,24 179:7,8 180:21 181:1,7 184:10 194:3,18  <b>indicated</b> [1] 201:6  <b>indicates</b> [3] 22:4 47:25 50:5  <b>indigenous</b> [2] 45:17 207:11  <b>indirect</b> [1] 77:21  <b>individual</b> [22] 26:15 58:3 79:1 105:13 109:14 110:17 127:14 140:14 141:6,6 146:3 148:22 175:8,23 177:10 184:10 185:7,16 186:2 188:2 189:11 202:13  <b>individualized</b> [2] 125:19 164:4  <b>individuals</b> [11] 25:23 27:1 59:9 60:19 64:20 84:21 96:11 140:22 178:5 185:6 187:7  <b>inevitably</b> [1] 196:21</p>	<p><b>inferences</b> [1] 101:4  <b>inherent</b> [1] 159:9  <b>inhibition</b> [1] 191:1  <b>initial</b> [1] 122:6  <b>initiate</b> [1] 46:21  <b>initiated</b> [1] 189:24  <b>injury</b> [8] 57:24 58:18 59:20 186:1,5,11 187:10,10  <b>inquiry</b> [2] 95:13 164:19  <b>inserted</b> [1] 36:10  <b>instance</b> [1] 26:2  <b>instead</b> [2] 68:3 154:7  <b>instinct</b> [2] 84:6 149:19  <b>instructive</b> [1] 127:20  <b>insufficient</b> [1] 207:12  <b>intact</b> [1] 164:7  <b>integral</b> [1] 31:25  <b>integrated</b> [2] 103:23 129:20  <b>integrity</b> [6] 17:23 18:1 48:1,8 104:21,22  <b>intended</b> [4] 61:21 160:6 165:19 205:5  <b>intent</b> [1] 143:20  <b>inter-country</b> [3] 83:11,13 84:5  <b>interacted</b> [1] 183:3  <b>interaction</b> [4] 132:3 146:6,8 147:25  <b>Intercourse</b> [2] 14:23 15:13 75:3,18 76:1,23 77:2,2 84:20 85:2 102:10,16,16, 21 103:2 132:3 146:5 147:22,25 168:9 194:20  <b>interest</b> [25] 11:19,21 12:23 31:16 39:7 43:14 48:21 49:4 53:3 116:19 117:4 125:14 136:4,5,6,19 164:19,25 165:17 168:3 182:15 204:18 205:6,17,21  <b>interested</b> [2] 23:21 42:22  <b>interests</b> [57] 4:15 5:13 8:12,14 9:5,6 10:1,24 11:1 12:3,5 14:12 17:3 26:22 28:18 43:19 51:14 52:7 110:8 116:11,24 117:15 118:7,8,10,14,16,19 119:14,17,22 120:16 121:14 123:10,12 125:2,10,17 126:13 127:7 130:14 135:15 149:25 150:17 153:21,23 160:1,4 161:20 162:3,5,13 164:1 165:4,6 166:14 182:12  <b>interfering</b> [1] 53:22  <b>INTERIOR</b> [5] 1:3,21 11:16 110:18 165:23  <b>Interior's</b> [1] 138:12  <b>internal</b> [5] 14:13 17:4 22:10 28:21 45:9  <b>internationally</b> [1] 91:9  <b>interpret</b> [1] 58:22  <b>interpreted</b> [1] 64:22  <b>interrupt</b> [3] 33:24 66:12</p>
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## Official - Subject to Final Review

<p>77:11  <b>interstate</b> <sup>[3]</sup> 79:10 80:3,4  <b>intervene</b> <sup>[1]</sup> 97:17  <b>intrusion</b> <sup>[1]</sup> 63:2  <b>invalid</b> <sup>[1]</sup> 191:21  <b>invasions</b> <sup>[1]</sup> 168:14  <b>inverse</b> <sup>[1]</sup> 188:12  <b>investing</b> <sup>[1]</sup> 72:5  <b>Investment</b> <sup>[1]</sup> 71:3  <b>invidious</b> <sup>[2]</sup> 21:24 96:22  <b>involve</b> <sup>[1]</sup> 39:8  <b>involved</b> <sup>[9]</sup> 27:25 39:20  54:14 65:5 93:1 108:12  127:21 140:22 197:17  <b>involves</b> <sup>[2]</sup> 50:25 165:24  <b>involving</b> <sup>[3]</sup> 14:20 85:3  121:15  <b>iota</b> <sup>[1]</sup> 207:17  <b>irony</b> <sup>[1]</sup> 41:11  <b>isn't</b> <sup>[15]</sup> 18:2 65:9 71:16  79:14 82:17 86:12 87:22,  24 93:6 97:23 105:18 110:  7 136:17 194:17 197:3  <b>issue</b> <sup>[11]</sup> 6:20 22:19 43:22  94:14,15 105:18 114:19  124:2 157:16 161:24 190:  15  <b>issues</b> <sup>[6]</sup> 10:13 21:1 56:6  114:21 142:2 160:2  <b>it'll</b> <sup>[1]</sup> 43:22  <b>Italian</b> <sup>[1]</sup> 171:24  <b>iterations</b> <sup>[1]</sup> 145:1  <b>itself</b> <sup>[13]</sup> 24:23 28:24 29:1  30:23 44:7 61:4 71:4 95:  16 98:17 101:18 161:8  192:22 206:18  <b>IV-B</b> <sup>[1]</sup> 57:8  <b>IV-E</b> <sup>[1]</sup> 57:8  <b>IX</b> <sup>[2]</sup> 101:16 102:1</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>JACKSON</b> <sup>[36]</sup> 16:17,19  17:7,14 18:15,21 47:10,11  48:19 49:5,15 51:4,16 52:  8,19 53:6 54:11,19,25 64:  11,14 65:15 98:12,13,24  99:2 101:2 102:6 114:17  159:23,24 201:1,2,14,18,  21  <b>Jackson's</b> <sup>[1]</sup> 42:18  <b>James</b> <sup>[1]</sup> 100:20  <b>Jicarilla</b> <sup>[2]</sup> 76:4,13  <b>join</b> <sup>[1]</sup> 136:21  <b>joint</b> <sup>[4]</sup> 171:24 172:1 203:  25 204:12  <b>JUDD</b> <sup>[3]</sup> 2:9 3:7 55:11  <b>judge</b> <sup>[3]</sup> 6:6 138:25 185:  23  <b>judges</b> <sup>[2]</sup> 21:9,13  <b>judgment</b> <sup>[29]</sup> 21:15 32:23  40:21 44:22 49:8 82:23 87:  25 104:1 106:15 107:1  110:13,14 115:22,23 122:  22 124:8,9,12 125:11 138:</p>	<p>25 139:16 153:2,4 162:9,  14 164:25 174:16 182:19  186:5  <b>judgment's</b> <sup>[1]</sup> 145:18  <b>judgments</b> <sup>[8]</sup> 51:2 82:20  116:25 119:7 121:24 122:  3 146:13 156:5  <b>jurisdiction</b> <sup>[5]</sup> 9:12 14:16  41:7 62:23 89:11  <b>jurisprudence</b> <sup>[2]</sup> 105:9  114:1  <b>jurors</b> <sup>[1]</sup> 187:24  <b>Justice</b> <sup>[554]</sup> 2:12 4:3,10 5:  17,19,24 6:25 7:4,9,14,19,  24 8:5,10 9:4,16,25 10:9,  23 11:22 13:7,22 14:17 15:  9,21,23 16:17,18,19 17:7,  14 18:15,21,22 19:10,12,  20,23 20:2,8,11,16,20 21:4,  8,12,18,21 22:12,15,20,25  23:1,2,2,4,11,17,20 24:7  25:10,10,11,12,21 26:8,10,  12,17,25 27:6,8,10,10,11  29:5,11 30:15 31:18,20 32:  11,14,19 33:7,8,10,13,23,  25 34:4,14,16,19,24 35:9,  12,19,23 36:2,6,14,21 37:5,  11,22 38:2,12,19 39:4,18,  22 40:9,13,14 41:10,21 42:  3,5,11,13,15,15,17,18,25  43:21 44:4,10,15,25 45:24,  25,25 46:1,2 47:8,9,9,11  48:18 49:5,15 51:4,16 52:  8,19 53:6,10 54:11,19,25  55:2,8,14 56:12 58:20 59:  6,7,22 60:11,18,21,23 61:7,  9 62:13,20 64:11,12,14 65:  15 66:9,11,17,19,25 67:3,  16,21 68:5,9,10,19,20 69:  13,16,19 70:10,20,23 71:8  72:15,21,25 73:17 74:25  75:10 76:24 77:10 78:15,  23 79:4,9,12,16,20,23 80:5,  12,15,20,24 81:8,24 82:5,  12,13 83:3,7,10,17,20,23  84:2,9,12,14,15,16,19 85:1,  11,21,24 86:2,9,17,22,24,  24,25 88:9,24,25,25 89:2,9,  12 90:18,22,25 91:24 92:9,  19,24 93:12,19,23 94:10,  11,11,13 95:3,10 96:24,25,  25 97:2 98:10,11,11,13,24  99:2,16 101:2 102:6,10  103:6,12 105:16 106:12  107:4,5,6,8,17 108:8,17,22,  25 109:20,24 110:7 111:1,  2,3,4,5 112:3,5,9,10,15,19  113:3,12,16,23 114:8,17  115:3,24 117:2,12,19,24  118:5,10,17 119:9 120:6,  13,23 121:3,11 122:4,6,6,  14,17 123:9,15,20,24 124:  2,7,16,19,21,23 125:20,24,  25 126:1,2,7,10 127:8,10</p>	<p>128:15,18 129:9,12,25 130:  5,12,17,22,25 131:4,8,17  132:10,19,22,25 133:4,13,  15,25 134:7,10,13,15 135:  2,23 136:11,13,14 138:6,  18 139:17 140:2 141:12,19  142:6,9,9,11,24,25 143:7,  10,16,25 144:11,20,21,21,  22 146:24 147:3 148:2,3,3,  5,6,15,18 149:8,17 150:7,  10,25 151:5,14,19,25 152:  4,7,10,18,20,22,25 153:17,  20 154:2,3,5,14,23 156:7,  10,19,20 157:3,7,11,19,20  158:17,22,25 159:8,11,22,  22,24,25 162:17,21 164:17  167:3 169:13,14,15,17,18,  25 170:4,7 172:3 173:18,  20 174:8,13,20 175:25 176:  7,10 177:12 178:10 179:3,  6,24 180:2,6,10 181:16  182:6 183:17,19 184:1,16  185:10,10,12,13,14 186:17  188:8,9,15,16,16,18 189:  22 190:25 191:5,16,24,24  192:1,11,15 193:6,11,14,  17,20 194:23 195:5,8,12,  18,19,19,21 196:10,13,17,  24 197:22,25 198:7,12,17,  22 199:7,11,16,19,25 200:  3,6,11,24,25,25 201:2,3,14,  18,21 203:10,14,18 206:12  207:5,6 208:5  <b>Justices</b> <sup>[3]</sup> 75:1 170:17  179:14  <b>justification</b> <sup>[6]</sup> 45:4 110:  22 169:19 175:3 176:21  188:3  <b>justify</b> <sup>[5]</sup> 44:1,11 85:20  170:5 175:19</p> <hr/> <p style="text-align: center;"><b>K</b></p> <p><b>Kagama</b> <sup>[4]</sup> 16:14 71:4  104:11,16  <b>Kagan</b> <sup>[30]</sup> 27:10,11 29:5,  11 30:15 31:18 32:11,14,  19 33:7,13 39:22 72:15,21,  25 73:17 86:24,25 88:9,24  144:21,22 146:24 147:3  148:2 181:16 182:6 185:  14 186:17 188:15  <b>Kagan's</b> <sup>[2]</sup> 40:14 157:21  <b>Kavanaugh</b> <sup>[70]</sup> 42:16,17  43:1,21 44:10,15,25 45:24  75:10 94:12,13 96:24 129:  25 130:5,12,17,22,25 131:  4,8,17 132:10,19,22,25  133:4,15 135:23 148:5,6,  18 149:8,17 150:7,10,25  151:5,14,19,25 152:4,7,10,  18,20,22,25 153:17,20 154:  3,6 159:25 169:14,17 188:  9 191:25 192:1,11,15 193:  6,11,14,17,20 194:23 195:</p>	<p>5,8,12,18 207:6  <b>Kavanaugh's</b> <sup>[2]</sup> 134:15  156:21  <b>keep</b> <sup>[6]</sup> 47:18 89:24 164:6,  7,8,16  <b>keeping</b> <sup>[1]</sup> 183:22  <b>keeps</b> <sup>[1]</sup> 164:7  <b>kick</b> <sup>[2]</sup> 133:21 134:18  <b>Kidnapping</b> <sup>[5]</sup> 37:8,23 91:  10 92:2,11  <b>kin</b> <sup>[3]</sup> 119:7 127:5 153:7  <b>kind</b> <sup>[5]</sup> 39:23 78:12 169:6  171:9 173:8  <b>kinds</b> <sup>[3]</sup> 17:17 55:18 184:  22  <b>kinship</b> <sup>[5]</sup> 104:22 117:11  125:13 153:15 162:11  <b>KNEEDLER</b> <sup>[145]</sup> 2:11 3:  10 103:8,9,11 105:16,21  106:14 107:12 108:3,20,24  109:3,22 110:4,10 111:18  112:4,7,14,17,21 113:7,14,  20,25 114:13,17,25 115:10  116:20 117:6,16,20 118:2,  9,12,23 120:1,8,17 121:1,4,  20 122:4,12,16 123:4,14,  19,23 124:1,6,11,25 125:  22 126:4,6,15 127:9,16  128:17,19 129:1,11,14 130:  4,8,16,19,24 131:1,6,9,18  132:18,21,23 133:2,7,24  134:2,9,11 135:1,5 137:3  138:11,20 139:22 140:6  141:18,22 142:7,22 143:6,  9,14,22 144:5,12,22 145:  14 147:2,5 148:16,20 149:  13,21 150:8,20 151:2,6,15,  23 152:2,5,9,16,19,21,24  153:1,18 154:1,2,13,22  155:10 156:8,15,22 157:4,  9 158:5,19,23 159:4,9,13  161:2 170:21 173:21,23  176:1  <b>knock</b> <sup>[1]</sup> 28:8  <b>knowledge</b> <sup>[1]</sup> 49:2  <b>known</b> <sup>[1]</sup> 41:24  <b>knows</b> <sup>[1]</sup> 191:10</p> <hr/> <p style="text-align: center;"><b>L</b></p> <p><b>lack</b> <sup>[1]</sup> 66:5  <b>land</b> <sup>[24]</sup> 16:22,25 26:24 33:  21 72:8 89:15,20,21,24 90:  1,8,9 146:21 167:23 168:7,  15 169:3,3,5,8,10 193:21  194:11,24  <b>landless</b> <sup>[2]</sup> 169:9,9  <b>lands</b> <sup>[13]</sup> 9:13 14:12 15:10  28:18 40:17 41:9 51:15 55:  24 71:7 90:6,10 145:7 207:  20  <b>language</b> <sup>[4]</sup> 57:15,17 61:  24 75:2  <b>large</b> <sup>[4]</sup> 24:6 103:17 104:  11 205:16</p>	<p><b>larger</b> <sup>[1]</sup> 206:22  <b>last</b> <sup>[7]</sup> 56:21 93:6 111:13  127:8,10 139:17 202:23  <b>Lastly</b> <sup>[1]</sup> 41:10  <b>late</b> <sup>[1]</sup> 203:14  <b>later</b> <sup>[4]</sup> 22:23 67:24 68:24  101:17  <b>Latino</b> <sup>[4]</sup> 95:7,8 132:15,16  <b>latter</b> <sup>[1]</sup> 37:18  <b>Laughter</b> <sup>[11]</sup> 84:18 113:  24 126:5,9 164:14 175:1  195:17 200:23 201:13 203:  13,19  <b>law</b> <sup>[48]</sup> 5:17 6:9 26:2 29:21  36:17,20,23 37:7 39:20 47:  14 54:18 58:22,24 59:25  63:11 65:17 68:14,25 76:  13,17 80:16,17 81:11 85:  11,14 86:10,11 91:2,8 95:3  97:20,21 107:15 108:18  109:25 110:1 138:21 162:  8,11,25 167:1 185:22 189:  17 191:10 193:8 194:8  197:7 202:23  <b>laws</b> <sup>[23]</sup> 17:5 19:8 25:17,  25 37:19 41:1,4 43:5,7 48:  25 55:18 63:7 64:7 75:4,6  77:23 79:24 108:8 143:4  144:3 206:20 207:14,18  <b>lay</b> <sup>[1]</sup> 159:19  <b>least</b> <sup>[19]</sup> 24:23 33:16 79:7,  8 81:25 82:2 89:10 92:22  95:20 96:7 98:20 109:4  115:14 141:15,16 153:5  200:21 204:24 205:21  <b>leave</b> <sup>[2]</sup> 57:3 150:12  <b>led</b> <sup>[1]</sup> 116:24  <b>Lee</b> <sup>[2]</sup> 19:6 48:23  <b>left</b> <sup>[6]</sup> 64:2 74:12,17 81:17  154:3 174:18  <b>legal</b> <sup>[6]</sup> 88:8 198:1,19 202:  10 207:24 208:1  <b>legally</b> <sup>[1]</sup> 19:20  <b>legion</b> <sup>[2]</sup> 15:8 59:8  <b>legislate</b> <sup>[4]</sup> 10:11 81:19  99:17 168:18  <b>legislated</b> <sup>[4]</sup> 75:14 168:  10 194:10,12  <b>legislating</b> <sup>[1]</sup> 180:21  <b>legislation</b> <sup>[7]</sup> 27:14 37:20  68:15 181:15 193:24 194:  1 203:9  <b>legislative</b> <sup>[7]</sup> 17:15 42:19  47:22 160:12 161:6 177:5,  5  <b>legitimate</b> <sup>[3]</sup> 171:2 173:  14 202:4  <b>legs</b> <sup>[1]</sup> 28:8  <b>lens</b> <sup>[1]</sup> 49:19  <b>level</b> <sup>[4]</sup> 10:18 124:17 140:  3 141:14  <b>liberties</b> <sup>[2]</sup> 77:25 80:6  <b>liberty</b> <sup>[1]</sup> 43:19  <b>lie</b> <sup>[1]</sup> 104:23</p>
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## Official - Subject to Final Review

<p><b>lies</b> [1] 190:4  <b>light</b> [4] 50:16 84:10 99:14 100:6  <b>lightly</b> [2] 127:1,1  <b>likely</b> [1] 122:19  <b>likes</b> [1] 159:15  <b>limit</b> [8] 11:10 70:24 71:9 158:3 167:20,22,24 169:11  <b>limitation</b> [3] 140:24 158:2 184:17  <b>limitations</b> [1] 101:15  <b>limited</b> [21] 5:12 11:18 14:21 16:19,22 24:25 26:13 27:2 35:6 45:20 49:2,21 52:6,11 75:5,7 89:4,6 112:11 113:4 178:13  <b>limits</b> [18] 43:23 50:21 70:25 72:1 81:21 105:17,19 107:25 108:1 112:24 113:2 148:11 158:25 167:4,5,8,12 202:21  <b>line</b> [17] 14:18 22:8 27:19 28:13,15,22,24 40:20 45:8 81:1 84:7 94:17 95:14,17 96:23 143:25 190:21  <b>lined</b> [1] 41:13  <b>lines</b> [2] 128:16,18  <b>link</b> [2] 45:4 179:10  <b>linked</b> [1] 93:20  <b>liquor</b> [3] 78:2 127:23 168:16  <b>list</b> [6] 4:18 29:7 75:8 82:14 181:10 203:24  <b>Literally</b> [2] 193:24 195:15  <b>litigating</b> [1] 188:2  <b>litigation</b> [3] 146:19 175:17 191:3  <b>little</b> [6] 37:15 39:5 49:23 57:3 165:14 205:7  <b>live</b> [4] 43:9 79:2 88:7 171:5  <b>living</b> [4] 173:7 184:10 185:7 194:3  <b>locality</b> [1] 34:8  <b>logical</b> [1] 131:24  <b>long</b> [12] 27:13,19 28:13 29:7 39:21 50:25 53:20 54:2 64:22 86:11 157:24 166:4  <b>long-furnished</b> [1] 150:3  <b>long-term</b> [2] 104:22 127:6  <b>longer</b> [4] 11:15 116:6,6 120:25  <b>look</b> [19] 12:8 18:13 38:1 48:20 49:19,25 53:13 78:25 95:16 110:12 119:1 152:3 156:3 157:5 161:5 178:24 190:16,22 204:17  <b>looked</b> [6] 64:5 68:2 96:17 155:15 165:12 187:19  <b>looking</b> [4] 119:6 121:25 122:1,2  <b>looks</b> [2] 68:2 156:6  <b>Lopez</b> [2] 35:7,21  <b>lose</b> [1] 57:7</p>	<p><b>lot</b> [13] 47:14 78:4 80:25 91:1 92:23 112:1 132:3 145:15,20 165:10 167:17 183:9 204:9  <b>lots</b> [1] 37:6  <b>lower</b> [1] 186:23</p> <p style="text-align: center;"><b>M</b></p> <p><b>made</b> [32] 11:3 30:25 32:4,15 46:10 48:7 66:3 76:5 96:1 99:7 110:13,14 118:18 119:7 121:24 124:11 125:11 128:7 145:18 153:2 162:8 164:24 179:13,15 182:19 183:4 187:2 196:3 198:13 203:1 206:10,25  <b>Madison</b> [1] 100:20  <b>madness</b> [1] 190:4  <b>magic</b> [2] 69:20 82:5  <b>main</b> [2] 175:20 188:25  <b>Maine</b> [5] 171:9,11 172:22 173:12 184:23  <b>major</b> [7] 35:4 66:19,23 67:1 162:2 163:18 203:8  <b>majority</b> [2] 47:1,4  <b>man</b> [1] 14:21  <b>Mancari</b> [39] 22:16 24:23 25:1 28:24,24 29:1,1,5,6 43:23 44:1,6,11 45:18,19 95:16,18 96:5,17 98:14 105:21 106:6 148:9,11,21 175:3,9,10,21,21 176:21,24 178:21 180:17 193:23 194:17 206:18,23 207:4  <b>mandate</b> [1] 149:10  <b>mandated</b> [1] 44:11  <b>mandatory</b> [4] 57:14,16 58:13 63:25  <b>manner</b> [6] 42:7 99:5,6 106:25 110:24 140:8  <b>many</b> [10] 13:6 39:7 47:19 68:21 78:6 110:16,16 157:9 172:9 203:2  <b>marital</b> [1] 75:11  <b>marker</b> [1] 140:19  <b>marriage</b> [2] 14:20 85:14  <b>married</b> [1] 75:12  <b>Marshall</b> [1] 75:1  <b>massive</b> [1] 90:2  <b>materials</b> [3] 65:18 100:13,18  <b>mates</b> [1] 183:1  <b>matter</b> [18] 2:2 17:18 18:1,25 27:5 64:21 82:8 87:21,22 88:17 92:3 97:19 98:6,21 99:9 112:23 114:11 192:20  <b>matters</b> [5] 36:23 39:9,17,20 158:23  <b>MATTHEW</b> [5] 2:7 3:3,16 4:7 203:15  <b>McCollum</b> [1] 187:14  <b>McGILL</b> [120] 2:7 3:3,16 4:6,7,9 5:24 7:2,6,12,16,22</p>	<p>8:1,8,24 9:7,24 10:5,14 11:4 12:7 13:17,24 15:15 16:1,24 17:10 18:5,20 19:5,11,19,23 20:7,14,19,22 21:7,11,14,20 22:5,14,18 23:8,15,19,25 24:22 25:20,24 26:9,16 27:4,7 28:11 29:10,16 31:7 32:6,12,18,25 33:7,22,24 34:1,11,15,17,22 35:5,10,15,20,25 36:4,10,19,25 37:17,24 38:9,16,23 39:12 40:4,10,23 41:17,23 42:4,9,12,25 44:6,14,16 45:6 46:2,24 48:17 49:9 51:4 52:2,12,25 54:5,12,23 55:1,4 61:12 91:4 115:25 136:17 203:12,15,17,20  <b>McGowan</b> [1] 168:17  <b>mean</b> [51] 11:5,23 13:4,24 17:21 23:12 29:5 46:20 47:1 56:12 72:21 74:1,5 78:24 87:20 94:3 102:15,16 107:18 113:17,17 114:6 115:12 118:4 123:7,17 129:21 130:8,10 133:17 134:20,22 147:6 150:20 152:3 153:9 154:16 158:9 175:6 181:9,13,24 182:6 190:12 192:18 195:14 196:5 197:20 198:5 200:3 202:15  <b>Meaning</b> [5] 9:17 43:18 74:25 123:16 130:12  <b>meaningful</b> [1] 203:2  <b>means</b> [22] 4:23 33:4 73:2,22 74:5,6 75:3 102:15,18 107:22 109:22 111:7,8 112:22,23 115:17 146:5,20 151:6 158:21 175:7 192:3  <b>meant</b> [3] 75:17 102:9 153:1  <b>measure</b> [1] 104:12  <b>mediating</b> [2] 91:7 92:5  <b>mediation</b> [1] 37:7  <b>medical</b> [1] 166:9  <b>Medicare</b> [1] 57:7  <b>meet</b> [2] 175:3 176:20  <b>member</b> [28] 12:4 31:9 34:7,9 96:20 97:13 128:13,25 131:20 133:12 135:3 136:24,24 137:4,23 138:3 142:14,18 143:2 144:2 151:3 170:14 173:6 175:12 180:1 197:11,16 207:22  <b>members</b> [42] 11:25 23:18 26:15 71:6 75:22 77:15 82:19 89:7 95:24 105:13 116:7,14 117:10 118:1,11,20 119:15 120:4,7 127:14 128:8 131:3 135:8 140:14 141:6 145:17 148:25 149:10 153:9,10,11 163:24 169:21 170:11 171:5 178:3,11,19 181:14 183:21 185:7</p>	<p>194:11  <b>membership</b> [12] 18:13 31:8 42:22 128:17,23 143:3 144:9,15 156:23 157:13 158:15 163:22  <b>men</b> [4] 75:12 102:17,17,19  <b>Menominee</b> [2] 76:3,3  <b>mention</b> [2] 63:20 190:12  <b>mentioned</b> [9] 22:1 37:11 64:3 69:8 108:9 115:25 144:18 146:1 192:2  <b>mentions</b> [1] 22:3  <b>mere</b> [3] 6:3 110:4 177:9  <b>merely</b> [1] 6:4  <b>message</b> [1] 161:4  <b>metaphor</b> [1] 188:14  <b>metaphors</b> [1] 76:8  <b>method</b> [2] 176:14,17  <b>might</b> [36] 9:7 14:15 16:4 19:21 20:21 26:8 35:9 44:23 58:22 62:19 66:11 74:8 80:18,20,21 85:19 86:6 90:13 108:7 111:18,24,24 112:1,8 135:24 138:2 140:12 142:23 149:25 150:8 152:6 160:3 177:25 178:1 186:9 198:22  <b>miles</b> [1] 173:2  <b>million</b> [4] 57:9,19,20 173:2  <b>mind</b> [1] 109:5  <b>minimum</b> [3] 86:12 105:1 161:21  <b>minority</b> [1] 155:24  <b>minute</b> [1] 5:20  <b>misguided</b> [1] 108:24  <b>mishmash</b> [1] 111:12  <b>missing</b> [1] 20:21  <b>mission</b> [1] 150:6  <b>mistaken</b> [1] 29:12  <b>misunderstanding</b> [2] 133:19 134:1  <b>Mm-hmm</b> [1] 151:5  <b>modest</b> [1] 66:15  <b>modify</b> [2] 164:24 178:11  <b>Moe</b> [1] 28:15  <b>moment</b> [1] 36:3  <b>money</b> [3] 57:9,25 90:14  <b>Montana</b> [1] 169:10  <b>Moreno</b> [1] 141:8  <b>morning</b> [3] 4:4 179:15 187:9  <b>Morton</b> [2] 78:9,11  <b>most</b> [14] 8:13 12:22,22 39:10 43:12 66:23 68:19 91:21 143:4 174:3 184:9 188:8 189:24 201:10  <b>mostly</b> [2] 39:10 160:2  <b>mother</b> [1] 133:18  <b>move</b> [4] 155:3 157:8,11,14  <b>moved</b> [1] 166:22  <b>much</b> [18] 11:19 28:4,7 29:2 30:10,12 59:4 63:1 148:17 149:7,14,19 160:17 187:</p>	<p>17 189:6 203:17 205:21 207:9  <b>Multi-Ethnic</b> [1] 38:17  <b>municipal</b> [1] 96:11  <b>Murphy</b> [4] 56:10 60:8 62:1 67:25  <b>must</b> [9] 6:10 15:4 69:11 83:12 84:3 121:9 128:13 204:22,24</p> <p style="text-align: center;"><b>N</b></p> <p><b>narrow</b> [4] 5:12 11:18 35:1 49:19  <b>narrower</b> [3] 59:4,6 100:24  <b>narrowly</b> [1] 49:25  <b>nation</b> [7] 75:22 76:5 132:6,7 161:19 205:22 207:23  <b>nation's</b> [2] 39:11 207:18  <b>national</b> [2] 24:10 104:12  <b>nations</b> [3] 91:18 144:16 181:5  <b>nationwide</b> [2] 55:16 94:6  <b>Native</b> [14] 4:12,14,17,23 28:4 29:22 39:21,25 77:17,23 79:2 93:2,24 168:25  <b>naturalization</b> [1] 62:22  <b>naturalizations</b> [1] 64:4  <b>nature</b> [3] 27:15 98:8 201:18  <b>Navajo</b> [5] 135:3 172:23 205:22 207:18,23  <b>navigation</b> [2] 77:3 102:23  <b>NCAA</b> [1] 60:8  <b>near</b> [4] 41:14 43:9 96:8 194:3  <b>nearest</b> [1] 65:18  <b>necessarily</b> [6] 9:5 23:18 89:25 94:3 129:5 146:10  <b>necessary</b> [9] 52:21 65:11 95:20 110:12 139:7 159:20 160:8,15,21  <b>need</b> [8] 13:21 18:13 30:16 49:18 108:2 159:17 177:1 188:14  <b>needs</b> [5] 11:7 12:25 87:7 186:22,22  <b>neither</b> [1] 96:18  <b>never</b> [10] 41:13 49:1 105:11 158:10 170:24 171:12,16 188:9 194:9 202:25  <b>new</b> [8] 5:11 45:19 54:1,9 64:17 77:11 90:5 206:22  <b>newborns</b> [2] 192:5,12  <b>next</b> [2] 78:6 89:20  <b>nexus</b> [1] 148:24  <b> nibbles</b> [1] 81:11  <b>nice</b> [1] 187:10  <b>Nobody</b> [1] 131:12  <b>non-delegation</b> [2] 88:5,6  <b>non-family</b> [6] 12:3 116:14 118:1,11,20 119:14  <b>non-Indian</b> [7] 4:18,25 103:19 107:11 116:8 125:15 199:23</p>
---	---	--	---	--

## Official - Subject to Final Review

<p><b>non-Indians</b> [8] 15:2 146:6,9 148:1 166:21 167:11 168:13 194:12</p> <p><b>non-tribal</b> [1] 11:24</p> <p><b>none</b> [2] 151:21 200:16</p> <p><b>nonetheless</b> [1] 94:8</p> <p><b>nonsensical</b> [2] 194:25,25</p> <p><b>normal</b> [4] 14:3 116:12 121:13 205:6</p> <p><b>normative</b> [1] 72:18</p> <p><b>northern</b> [1] 132:6</p> <p><b>notable</b> [1] 206:13</p> <p><b>noted</b> [1] 62:20</p> <p><b>nothing</b> [18] 8:6 15:10,11 19:9 25:22 26:11 32:21 37:2 40:11 49:14 63:14,17,18 88:5 107:24 179:19,22 186:13</p> <p><b>notice</b> [1] 82:21</p> <p><b>notion</b> [1] 50:13</p> <p><b>November</b> [1] 1:25</p> <p><b>Number</b> [11] 27:24 39:2 76:8 112:11 122:25 127:21 167:19 170:17 179:14 180:14 185:20</p> <p><b>numbers</b> [3] 103:17 127:2 187:9</p> <p><b>numerous</b> [1] 139:14</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>oaths</b> [1] 62:22</p> <p><b>obey</b> [1] 199:11</p> <p><b>objection</b> [2] 197:1,6</p> <p><b>objective</b> [5] 18:9 49:11,12 117:7 162:9</p> <p><b>obligated</b> [1] 56:22</p> <p><b>obligation</b> [5] 60:17 61:14 75:19 76:2 159:21</p> <p><b>obligations</b> [13] 58:6 75:9 76:11,14 105:24 106:5 108:16 109:19 140:17 145:6 175:5 176:23 200:18</p> <p><b>obscures</b> [1] 56:7</p> <p><b>observations</b> [2] 75:24 88:3</p> <p><b>observed</b> [2] 85:7 104:11</p> <p><b>obvious</b> [2] 12:22 181:18</p> <p><b>obviously</b> [9] 40:8 54:9 107:13 122:18,19 131:18 153:10 167:4 188:4</p> <p><b>occasion</b> [1] 125:18</p> <p><b>occasional</b> [1] 74:8</p> <p><b>occupies</b> [1] 151:17</p> <p><b>occupy</b> [1] 104:8</p> <p><b>occurring</b> [1] 146:3</p> <p><b>occurs</b> [1] 34:3</p> <p><b>odd</b> [5] 37:15 53:24 74:10 171:17 199:2</p> <p><b>off-reservation</b> [14] 33:20 34:21,23 35:3 36:16,24 68:25 69:14 79:25 80:7 93:13 127:24 145:21 168:10</p> <p><b>off-tribal</b> [1] 33:20</p> <p><b>offenders</b> [1] 15:5</p>	<p><b>offenses</b> [1] 146:2</p> <p><b>offering</b> [1] 98:5</p> <p><b>Office</b> [2] 30:12 96:14</p> <p><b>officers</b> [1] 15:4</p> <p><b>official</b> [3] 20:11,17 68:8</p> <p><b>officials</b> [3] 20:5 56:7 186:19</p> <p><b>often</b> [8] 31:11 87:8 91:6 103:18 171:7 172:7 184:9 190:16</p> <p><b>Ogden</b> [1] 77:4</p> <p><b>Okay</b> [49] 20:2,20 22:20 27:6 29:11 34:24 36:14 38:13 40:13 42:13 47:8 60:21 66:25 69:13,16,19 79:13,23 82:18 85:1 89:9 92:19,21 99:3 109:1 117:2 118:5 120:13 121:1 123:10 126:7 130:5 131:18 132:22 142:6 150:10 154:1 157:3 158:17 167:18,20 172:2 176:25,25 185:4 196:24 197:2,12 201:14</p> <p><b>Oklahoma</b> [2] 54:15 55:5</p> <p><b>old</b> [5] 5:8 28:3 78:2 166:2 192:24</p> <p><b>older</b> [4] 53:11 138:6,7 193:1</p> <p><b>once</b> [4] 55:6 132:6 137:21 190:12</p> <p><b>one</b> [99] 6:4 9:21 12:12,16 15:7 24:20 27:16,18,24 29:9 30:21 37:25 42:20 44:1,6 53:7 60:5,12 61:13 63:9,10,18 65:7,16,17,18 66:15,18,20 68:19 70:18 71:1,14,16,23 72:9 73:7 79:5 81:5 91:6 93:21 94:19,24 95:22 97:5 101:10 108:5 110:2 111:5,5,13,13,13 115:4,20 118:2,3 122:5 123:11 124:3 131:20 132:7,7 133:18 138:17 139:4,17,17 142:1,13,23,23 143:3 145:3 146:17 150:21 153:22 155:13 167:23 171:5 173:6 174:12 177:24 190:11,19 192:5,18 193:16 194:16 196:24 197:2,2 199:5,8 200:21 204:24 206:12,13 207:17</p> <p><b>ones</b> [3] 47:6 57:1 67:1</p> <p><b>only</b> [26] 10:2 12:24 18:13 21:8 25:14 27:1,1 52:10 55:18 56:2 64:2 65:24 69:11 73:17 83:1 89:7 95:24,24 96:18 128:6 141:20 158:2 163:20 189:13 199:23 205:9</p> <p><b>open</b> [1] 81:17</p> <p><b>opening</b> [1] 185:14</p> <p><b>operate</b> [3] 21:9 120:2 156:12</p> <p><b>operated</b> [3] 96:7 129:18 207:13</p>	<p><b>operates</b> [6] 96:18 128:10,11 134:3 154:19 155:5</p> <p><b>operating</b> [4] 20:6 21:6 139:12 150:12</p> <p><b>operation</b> [3] 92:16 124:13 162:25</p> <p><b>operations</b> [2] 139:6,8</p> <p><b>operative</b> [1] 49:10</p> <p><b>opinion</b> [5] 15:21,24 70:15 187:15 204:11</p> <p><b>opinions</b> [2] 74:2 186:25</p> <p><b>opportunity</b> [1] 91:3</p> <p><b>opposed</b> [3] 48:15 167:8 172:20</p> <p><b>opposes</b> [1] 7:14</p> <p><b>opposite</b> [1] 173:3</p> <p><b>oppression</b> [1] 94:22</p> <p><b>option</b> [1] 97:8</p> <p><b>oral</b> [10] 2:2 3:2,6,9,12 4:7 55:11 103:9 162:19 206:14</p> <p><b>order</b> [1] 56:5</p> <p><b>ordering</b> [1] 68:15</p> <p><b>ordinarily</b> [4] 70:3 103:4 126:16 139:22</p> <p><b>ordinary</b> [11] 6:15 13:2 55:21 70:9,18 93:10,11 124:13 141:15,17 162:7</p> <p><b>Organization</b> [1] 124:14</p> <p><b>original</b> [7] 55:21 65:17 74:19 98:21 100:18,18 102:21</p> <p><b>originally</b> [2] 72:12 74:25</p> <p><b>orphan</b> [1] 93:4</p> <p><b>orphans</b> [1] 93:25</p> <p><b>other</b> [56] 9:15 12:6 28:7 29:7 32:17 37:6 40:19 41:13 44:2,19 59:15 62:10,11,14 63:9 66:19 70:8 72:7 76:25 81:20 87:15 88:16 94:25 101:13 102:20 104:17 116:11,19 119:20,20,24 121:10 130:2 135:25 136:8 139:20 145:24 148:14 149:2,25 150:14 153:23 155:17,24 161:12 167:9 168:4 171:14 172:7 179:21 180:11 191:9 193:16 196:25 204:1 205:1</p> <p><b>others</b> [6] 25:16 66:22 112:13 155:15 166:8 177:19</p> <p><b>otherwise</b> [7] 14:6 57:2 93:11 96:7 111:9 150:16 157:5</p> <p><b>ought</b> [1] 141:17</p> <p><b>ourselves</b> [1] 160:3</p> <p><b>out</b> [40] 12:16 28:8 39:22 42:20 43:23 52:9 53:13 57:20 58:14 59:7 61:11,23 65:10 70:14 74:12,22 77:12 78:5 107:2 108:15 119:10 136:3 145:5 161:6,7,25 162:5,9 171:25 181:13 183:13 184:25 189:4,4 194:2 197:15 198:24 199:</p>	<p>8 201:6 202:21</p> <p><b>outcomes</b> [1] 87:8</p> <p><b>outer</b> [2] 206:17,21</p> <p><b>outright</b> [1] 141:11</p> <p><b>outset</b> [1] 121:22</p> <p><b>outside</b> [10] 14:25 18:23 33:15 50:12 75:13 94:8,9 109:2 145:10 167:14</p> <p><b>over</b> [35] 4:12 9:18,19 17:8 49:18 50:2,3,7 51:22 55:19 68:13 73:20 74:4,13,13 75:21 77:7,20 93:10 99:12 103:20 104:3 106:19 135:14 147:19,23 163:4,11,20 172:23 177:19 182:24 191:22 192:5 195:7</p> <p><b>overall</b> [1] 118:25</p> <p><b>overcome</b> [1] 5:10</p> <p><b>overlap</b> [1] 142:1</p> <p><b>override</b> [2] 43:19 205:5</p> <p><b>overrule</b> [2] 13:15,21</p> <p><b>overturn</b> [1] 142:17</p> <p><b>overturned</b> [1] 65:25</p> <p><b>overturning</b> [1] 103:25</p> <p><b>overwhelming</b> [2] 46:25 47:4</p> <p><b>owed</b> [3] 127:13,14,17</p> <p><b>owes</b> [2] 104:9 127:12</p> <p><b>own</b> [12] 11:18 19:8 30:7 41:1,4 43:5,7 48:24 59:11 137:24 201:11 207:18</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> [1] 208:7</p> <p><b>PAGE</b> [4] 3:2 24:4 28:14 189:2</p> <p><b>paired</b> [1] 102:21</p> <p><b>Palmore</b> [2] 95:4,11</p> <p><b>paperwork</b> [1] 63:3</p> <p><b>paradigm</b> [1] 135:23</p> <p><b>paragraph</b> [1] 206:12</p> <p><b>parallel</b> [3] 137:15,20 181:3</p> <p><b>parallels</b> [2] 9:14 137:10</p> <p><b>paraphrasing</b> [1] 100:21</p> <p><b>parcel</b> [1] 144:15</p> <p><b>parcels</b> [1] 71:15</p> <p><b>pardn</b> [1] 34:15</p> <p><b>parens</b> [1] 188:4</p> <p><b>Parent</b> [13] 37:8,22 91:10 92:1,11 120:20 123:18 131:19,23 143:2 144:3 151:18 156:17</p> <p><b>parental</b> [1] 46:9</p> <p><b>parenting</b> [1] 126:21</p> <p><b>parents</b> [29] 40:8 56:16,16 59:10,16 95:5,7 120:10,21,24 123:21,22 125:20 126:18,20 128:19 129:3 131:2 136:23 137:21 143:5,11 152:14 163:24 166:1,4 169:21 183:14 204:1</p> <p><b>parents'</b> [2] 129:7 143:15</p> <p><b>parse</b> [1] 175:16</p>	<p><b>part</b> [29] 5:14 7:20 12:23 13:20 14:6 24:14 35:4 44:18 51:19 57:8,8 60:5 85:5 88:11,12 89:22 93:8 101:12 111:20 114:4,11 124:24 142:16,23 143:1 144:15 150:5 153:14 201:4</p> <p><b>participate</b> [3] 97:8 199:21,25</p> <p><b>participating</b> [1] 187:16</p> <p><b>particular</b> [18] 39:7 106:22 118:6 123:7 124:12 125:22 129:22 139:2 145:6 148:23 151:11 157:20 162:8 174:6 176:13 178:6 188:20 189:5</p> <p><b>particularly</b> [2] 56:14 148:24</p> <p><b>parties</b> [17] 2:13,15 3:11,14 46:7,15 61:16 67:7,12 97:8 103:10 110:3 162:20 189:18 190:7,15 195:23</p> <p><b>parts</b> [5] 15:16 57:10,10 88:2 91:5</p> <p><b>party</b> [8] 21:2 56:22,22 67:17 110:5 191:1 196:14 204:22</p> <p><b>pass</b> [3] 82:16,24 207:18</p> <p><b>passed</b> [1] 39:22</p> <p><b>passes</b> [1] 30:22</p> <p><b>passing</b> [1] 144:6</p> <p><b>past</b> [2] 63:24 146:1</p> <p><b>patently</b> [1] 63:9</p> <p><b>paternalistic</b> [1] 44:22</p> <p><b>patriae</b> [1] 188:5</p> <p><b>penalties</b> [1] 147:23</p> <p><b>pension</b> [1] 63:12</p> <p><b>people</b> [20] 21:8 24:5 45:17 71:25 89:23 94:23 95:1 96:3 101:4 115:15 139:20 141:2 149:25 153:11 155:17 174:18 177:15 182:3,23 184:7</p> <p><b>people's</b> [1] 94:21</p> <p><b>percent</b> [4] 57:19 122:24 179:17 181:19</p> <p><b>perfect</b> [1] 116:13</p> <p><b>perhaps</b> [10] 25:5 38:1,9,10 138:16 145:2 150:2 155:13 158:8 174:11</p> <p><b>peripheral</b> [1] 177:9</p> <p><b>permissible</b> [5] 8:2 44:24 60:7 62:19 63:24</p> <p><b>permit</b> [3] 10:11 122:10,10</p> <p><b>permits</b> [1] 84:4</p> <p><b>permitted</b> [2] 77:19 95:9</p> <p><b>permitting</b> [1] 40:5</p> <p><b>Perrin</b> [3] 161:4 167:10 168:20</p> <p><b>persist</b> [1] 90:19</p> <p><b>person</b> [3] 12:10 34:7 139:2</p> <p><b>personnel</b> [1] 121:25</p> <p><b>persons</b> [4] 24:3 25:8,9 43:</p>
---	--	--	---	--

## Official - Subject to Final Review

<p>17  <b>perspective</b> <sup>[3]</sup> 160:22  173:11 189:1  <b>pertaining</b> <sup>[1]</sup> 41:8  <b>Petitioner</b> <sup>[1]</sup> 1:13  <b>Petitioners</b> <sup>[2]</sup> 1:4 135:21  <b>Petitioners'</b> <sup>[2]</sup> 105:4 144:25  <b>phrase</b> <sup>[1]</sup> 74:3  <b>physical</b> <sup>[2]</sup> 87:10 166:23  <b>pick</b> <sup>[1]</sup> 154:3  <b>picks</b> <sup>[1]</sup> 6:7  <b>picture</b> <sup>[1]</sup> 195:22  <b>piece</b> <sup>[2]</sup> 13:25 193:24  <b>place</b> <sup>[12]</sup> 9:2 63:5 72:22, 25 73:21 90:9 108:4 115:5 124:3 131:25 179:20 197:8  <b>placed</b> <sup>[10]</sup> 4:25 6:22 31:10, 12 117:25 119:23 121:17 123:17 135:3 138:4  <b>placement</b> <sup>[36]</sup> 4:17 5:10, 22 6:17,18 12:11 13:5 18:7,12 30:24 31:7,25 36:13 38:18 39:5,9 42:21 43:3,8 46:8 49:13 52:17 97:10,18 99:7 103:19 116:1,13 117:21 119:19 134:17 189:12 191:13 198:4 204:21 208:2  <b>placements</b> <sup>[5]</sup> 125:6 126:14 165:20 189:6 196:20  <b>places</b> <sup>[4]</sup> 73:4,19 80:17 103:1  <b>Placing</b> <sup>[3]</sup> 18:9 125:11 197:17  <b>plain</b> <sup>[1]</sup> 63:15  <b>plainly</b> <sup>[4]</sup> 171:2 173:14,16 202:4  <b>Plains</b> <sup>[2]</sup> 17:1 132:6  <b>plaintiff</b> <sup>[2]</sup> 131:12 186:2  <b>Plaintiffs</b> <sup>[1]</sup> 163:14  <b>plaintiffs</b> <sup>[5]</sup> 170:25 185:17 186:11 188:2 191:15  <b>plan</b> <sup>[1]</sup> 57:5  <b>plausible</b> <sup>[2]</sup> 45:16 80:2  <b>play</b> <sup>[2]</sup> 5:4 201:6  <b>playing</b> <sup>[1]</sup> 183:2  <b>plays</b> <sup>[4]</sup> 12:16 91:7 184:25 202:21  <b>plea</b> <sup>[1]</sup> 105:4  <b>please</b> <sup>[5]</sup> 4:10 55:14 103:12 162:22 204:17  <b>plenary</b> <sup>[75]</sup> 9:20,20 13:9 14:6,8,10 15:25 16:9,21 17:8 18:4,23 19:4 24:9 26:13 49:17 50:3,23 52:6 53:21 55:19 56:1 64:23 65:22 66:4 69:25 70:5,17 72:13 73:2,22,24 74:4,5,10 75:2,17 76:20 81:4 93:7 98:14,21 99:12,18 100:9 104:24 105:10,17 107:21,22 109:2,4 111:7 112:19,22 113:6,9</p>	<p>114:20 115:5,12 122:10 123:2 147:19 157:22,22,24 158:20 160:20 161:12 163:4 166:19,20 167:5,8 191:22  <b>plucked</b> <sup>[1]</sup> 184:14  <b>plus</b> <sup>[1]</sup> 179:8  <b>pocketbook</b> <sup>[1]</sup> 59:20  <b>podium</b> <sup>[1]</sup> 78:25  <b>point</b> <sup>[40]</sup> 18:6,12 25:6 30:8, 9 31:13 37:18 43:2,11,12 45:14 51:10 61:8,10 63:7 73:18 77:8 81:23 85:8 87:20 92:4 101:7 114:9 118:6 123:10 124:15 127:21 129:16 134:22 148:6 155:16 172:17 173:19 175:20 188:25 193:20 195:8,13 198:13 206:11  <b>pointed</b> <sup>[2]</sup> 39:22 59:7  <b>points</b> <sup>[8]</sup> 69:22 74:15 91:15 101:11 163:2 166:18 193:7 194:15  <b>police</b> <sup>[1]</sup> 98:1  <b>policy</b> <sup>[13]</sup> 4:20 19:14,21 31:21,22,22 49:8 51:1 87:4,17 124:3 161:19 205:12  <b>political</b> <sup>[55]</sup> 21:25 22:16 26:18,21 27:15,21 28:5 30:20,22 31:5 32:22 62:4 96:8 109:7,12 122:22 133:8 134:24 135:10 140:8,10 148:7 150:23 151:7,7 154:11 155:2,6,12 156:13,24 157:2 163:19,23 170:12,13, 15 172:15 173:14,19 174:15 175:2 176:6,19 177:23 178:17 181:2,8,20,20,25 182:1 198:8 207:3,13  <b>politically</b> <sup>[1]</sup> 48:4  <b>politics</b> <sup>[1]</sup> 115:7  <b>polity</b> <sup>[4]</sup> 25:8 26:23 30:17 174:4  <b>poor</b> <sup>[1]</sup> 203:8  <b>population</b> <sup>[2]</sup> 122:24 177:15  <b>portion</b> <sup>[1]</sup> 16:2  <b>portrayed</b> <sup>[1]</sup> 35:1  <b>posed</b> <sup>[2]</sup> 119:14 177:22  <b>position</b> <sup>[6]</sup> 36:11 41:11 59:24 104:15 139:11 156:11  <b>positive</b> <sup>[1]</sup> 76:13  <b>possibility</b> <sup>[2]</sup> 44:7 125:18  <b>possible</b> <sup>[2]</sup> 38:5 152:2  <b>possibly</b> <sup>[2]</sup> 63:22 206:23  <b>post</b> <sup>[1]</sup> 89:17  <b>potential</b> <sup>[2]</sup> 56:16 146:9  <b>Potentially</b> <sup>[1]</sup> 59:14  <b>power</b> <sup>[152]</sup> 9:21 10:4,15 13:8 14:6,8,10,14 15:20,24 16:5,9,15,21,21 17:8,11,12 18:4,23 19:4,6,7 22:3 25:14 26:13 29:24 30:3 32:8</p>	<p>33:21 34:2 35:2 36:12 37:18 38:5,8,11,15,25 40:23, 24,25 52:5,16 55:19 56:1 57:5 64:19 65:1,22 66:4 68:8,13 69:5,25 70:5,17 71:2,5,15,18,18,24 72:2,13 73:2,6,10,11,16,20,22,24 74:4,10,16 76:20 77:9,20 81:4,14,16 82:16,24 83:14 90:5 92:17 93:7 94:4 98:1, 14,21 99:12,14,18,23 100:2,20,24 101:1,6,20,22 102:4 104:3,4,19,24 105:10,15, 17 108:18,21 109:2,4,7 112:20,22 113:6,10 114:20 115:6,12 123:2,4 127:18 128:4 139:24 141:25 142:4 144:25 145:4,10,11 147:19 157:23 158:1,24 159:10, 15 161:11,13 163:4,5 166:16,19,20 167:2,5,8 169:12 181:6  <b>powerless</b> <sup>[1]</sup> 38:25  <b>powers</b> <sup>[30]</sup> 10:10 14:12 69:10 70:19 72:12 74:20 75:2,3 80:14 81:20 90:24 93:10 94:9 104:14,24 106:4,8 122:10,10 139:9 140:9 147:4,7,10,12,13 159:15 168:4 191:22 194:13  <b>practical</b> <sup>[7]</sup> 98:6 110:25 146:13 156:8 192:20 198:8,23  <b>practice</b> <sup>[2]</sup> 119:11 203:21  <b>practices</b> <sup>[10]</sup> 103:16,22, 23,24 119:4 125:16 135:17, 18 152:11 160:23  <b>pragmatic</b> <sup>[1]</sup> 106:21  <b>preamble</b> <sup>[1]</sup> 61:18  <b>precedent</b> <sup>[3]</sup> 34:5 50:17 100:15  <b>precedents</b> <sup>[5]</sup> 13:16,21 14:2,7 78:2  <b>precisely</b> <sup>[2]</sup> 64:24 146:18  <b>preconditions</b> <sup>[1]</sup> 95:21  <b>predominates</b> <sup>[1]</sup> 174:5  <b>preemption</b> <sup>[1]</sup> 60:7  <b>preempts</b> <sup>[1]</sup> 80:17  <b>preference</b> <sup>[60]</sup> 12:11 18:8 22:19 24:25 25:2 29:3 44:2,12 49:14 78:12,20 95:6,7, 22 96:9 111:15,22 120:9, 21 130:1,6,6,15 131:11 132:13 133:5,20,21,22 134:6,18,19 135:4,20 148:8,13, 20 149:4,11 151:1,16 152:14 154:7 155:22 169:20 170:24 171:6,11 172:23 175:11,19 177:19 183:20, 21 184:15 185:9 191:3 202:7 205:8,23  <b>preferences</b> <sup>[23]</sup> 4:17 5:10 6:18,23 13:5 31:8 43:8 96:6 129:5 138:8,15 150:22</p>	<p>152:23 153:5 165:15 172:2 186:12,14 188:7 204:3, 22 206:16 208:2  <b>premise</b> <sup>[4]</sup> 31:15,17 50:22 64:18  <b>premises</b> <sup>[1]</sup> 29:21  <b>prepared</b> <sup>[1]</sup> 206:15  <b>preponderance</b> <sup>[1]</sup> 12:17  <b>prerogatives</b> <sup>[1]</sup> 66:8  <b>prescription</b> <sup>[2]</sup> 112:4,7  <b>present</b> <sup>[6]</sup> 45:22 137:15 150:8 173:24 176:3 207:7  <b>presented</b> <sup>[4]</sup> 7:21 10:7 81:23 154:6  <b>presenting</b> <sup>[1]</sup> 202:17  <b>preservation</b> <sup>[2]</sup> 40:22 139:15  <b>preserve</b> <sup>[2]</sup> 160:15 173:9 12 66:7 182:10  <b>President</b> <sup>[1]</sup> 122:18  <b>presumably</b> <sup>[1]</sup> 110:22  <b>presume</b> <sup>[1]</sup> 143:4  <b>presuming</b> <sup>[1]</sup> 123:11  <b>presumption</b> <sup>[3]</sup> 117:22, 25 165:22  <b>presumptions</b> <sup>[2]</sup> 164:3 166:13  <b>pretty</b> <sup>[3]</sup> 172:13,24,25  <b>prevent</b> <sup>[4]</sup> 46:12 52:21 169:7 196:4  <b>previous</b> <sup>[1]</sup> 99:25  <b>previously</b> <sup>[4]</sup> 25:18 81:6, 7 127:20  <b>primary</b> <sup>[3]</sup> 39:16 131:21 134:4  <b>principle</b> <sup>[5]</sup> 53:12 54:1 65:4 95:1,10  <b>principles</b> <sup>[5]</sup> 88:8 95:12 99:11 100:7 162:11  <b>Printz</b> <sup>[4]</sup> 62:15,17 64:3,9  <b>prior</b> <sup>[2]</sup> 39:24 50:25  <b>priorities</b> <sup>[3]</sup> 116:1 117:9 121:18  <b>priority</b> <sup>[3]</sup> 116:18 117:13 126:11  <b>prisoners</b> <sup>[1]</sup> 64:2  <b>private</b> <sup>[21]</sup> 46:15,19,21 61:15,16 67:7,12 68:4 97:7 129:23 189:6,9,18,19 190:7,15,24 191:1 195:23 196:13,19  <b>private-initiated</b> <sup>[1]</sup> 190:2  <b>privately</b> <sup>[2]</sup> 39:10,14  <b>probably</b> <sup>[6]</sup> 110:5 112:17 122:12 165:19 167:18 175:18  <b>problem</b> <sup>[30]</sup> 4:22 20:4 33:1,4 36:22 37:1 69:21 80:22 81:15 82:1,6 90:19 93:22 94:2,6 99:4 102:13 106:22,23,24 110:25 146:14 156:9 160:23 161:22 162:2 178:6 187:4 193:18 194:</p>	<p>15  <b>problems</b> <sup>[13]</sup> 26:1,6 34:18 82:4 83:2 98:15 99:13 100:10 104:21 139:1 162:2 188:11 199:15  <b>proceeding</b> <sup>[1]</sup> 86:12  <b>proceeding</b> <sup>[1]</sup> 185:25  <b>proceedings</b> <sup>[16]</sup> 6:21 8:13 46:21 56:2 67:18 82:10, 22 95:8 97:9 161:22 162:13 163:6 167:24 199:21 200:1 202:14  <b>process</b> <sup>[3]</sup> 5:23 6:24 66:1  <b>professionals</b> <sup>[1]</sup> 166:9  <b>profit</b> <sup>[1]</sup> 56:13  <b>program</b> <sup>[6]</sup> 111:21 114:5, 11 145:15 169:1,1  <b>programs</b> <sup>[3]</sup> 46:12 196:4, 7  <b>prohibit</b> <sup>[1]</sup> 99:11  <b>prohibited</b> <sup>[4]</sup> 56:10 70:6 168:11,15  <b>prohibition</b> <sup>[1]</sup> 127:23  <b>promise</b> <sup>[2]</sup> 5:17 77:23  <b>promises</b> <sup>[2]</sup> 77:17 79:1  <b>promote</b> <sup>[1]</sup> 96:12  <b>promotes</b> <sup>[1]</sup> 47:16  <b>promoting</b> <sup>[1]</sup> 140:21  <b>promulgated</b> <sup>[1]</sup> 11:16  <b>prong</b> <sup>[1]</sup> 170:24  <b>proof</b> <sup>[5]</sup> 8:21 12:14 14:24 85:3 125:5  <b>proper</b> <sup>[2]</sup> 15:4 84:21  <b>properly</b> <sup>[1]</sup> 173:24  <b>property</b> <sup>[8]</sup> 15:1 32:9 36:1 85:3 93:10 108:13 136:5, 10  <b>proportionality</b> <sup>[1]</sup> 155:16  <b>proposed</b> <sup>[1]</sup> 126:14  <b>proposition</b> <sup>[5]</sup> 98:18 117:11 118:16 127:24 137:9  <b>proprietary</b> <sup>[6]</sup> 31:16 43:14 53:3 136:19 205:17,21  <b>prosecute</b> <sup>[2]</sup> 72:6,7  <b>prospect</b> <sup>[1]</sup> 125:18  <b>protect</b> <sup>[7]</sup> 142:19 159:20 160:8 161:19 166:14,21 167:11  <b>protected</b> <sup>[1]</sup> 65:13  <b>protecting</b> <sup>[2]</sup> 82:19 104:21  <b>protection</b> <sup>[67]</sup> 10:6 13:23 19:16,25 20:3 21:19 26:1, 6 27:4 32:16 33:11 34:18 36:3 43:22 57:24 58:1,8, 10,14,16 59:10,15 60:16, 17 61:1,3 78:13,16 82:1 88:14,14 94:14,15 95:13 104:10,10,18,19 106:1 111:16 114:22 134:22 136:7 139:10 140:1,3 141:9,9 142:1 147:12 155:20 158:3 159:2,17 161:16 163:14 166:25 186:10,16 187:8,11</p>
--	--	--	---	---

## Official - Subject to Final Review

<p>191:2,12 198:2 199:15 205:18 206:11 <b>protections</b> [4] 103:21 105:6 109:14 162:4 <b>protective</b> [1] 109:23 <b>protector</b> [1] 16:14 <b>protects</b> [2] 163:25 164:4 <b>prove</b> [1] 85:13 <b>proverbial</b> [1] 5:4 <b>provide</b> [5] 21:20 46:11 61:22,25 196:3 <b>providers</b> [1] 203:24 <b>provides</b> [7] 9:11 26:3 41:6 78:9 161:10 165:21 192:22 <b>providing</b> [1] 177:13 <b>province</b> [1] 163:8 <b>proving</b> [1] 14:19 <b>provision</b> [15] 46:5,7 50:13 61:13,20,21 66:21 67:25 68:7 79:19 97:4 183:11 188:21,23 189:17 <b>provisions</b> [7] 58:2 62:10 77:16 90:15 160:14 167:9 189:16 <b>provoke</b> [1] 81:16 <b>proxy</b> [2] 10:21 207:2 <b>purely</b> [1] 132:23 <b>purpose</b> [5] 11:17 88:20,20 106:16 206:2 <b>purposes</b> [12] 21:23 62:8,9,25 82:2 83:6 88:22 90:7,10 92:14 98:22 137:13 <b>pursuant</b> [6] 52:22 58:4 72:9 81:19 160:19 168:4 <b>put</b> [9] 24:5,20 33:10 34:20 36:15 38:3 54:16 56:24 104:15 <b>puts</b> [2] 4:17 96:21 <b>putting</b> [1] 97:20</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>qua</b> [2] 25:4 145:8 <b>qualified</b> [1] 117:18 <b>question</b> [70] 7:5,10,20,20,25 8:2 10:16,20 12:10 14:5 18:17 20:15 21:23 25:6 27:2 29:2,17 31:15,21,22 37:14 38:12 42:18,24 47:13 49:16 53:7 61:12,18 64:6 67:3,4 68:11 81:17,18,22 82:14 91:4 107:21 111:7 112:10 114:20 115:6,19 120:3 122:7 126:18 127:11 134:15 139:18,23 141:1 142:24 146:16 158:18,20 167:13 170:16,18 173:22 174:24,25 185:16 192:18 193:21 196:22,25 198:16 199:9 201:4 <b>questions</b> [21] 5:18 40:14 47:19 56:11 100:16 115:4,11 116:20 130:1 149:19 150:9 157:20,21 164:12,13</p>	<p>169:15,19 178:25 192:2 203:4 207:7 <b>quick</b> [1] 196:25 <b>quickest</b> [1] 184:4 <b>quickly</b> [2] 94:14 157:14 <b>quintessential</b> [1] 142:16 <b>quite</b> [12] 13:9 29:8 58:20 88:23 111:11 112:8 171:4,7,21 173:5 179:20 190:9</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>race</b> [9] 10:19,22 82:10 95:2 96:4,22 132:24 150:19 207:2 <b>racial</b> [20] 21:24 26:19 27:16 29:8 146:22 147:7 148:7 154:11,20 155:8,25 156:13 170:14 173:15,19 174:2,5 177:23,25 206:1 <b>raise</b> [3] 115:11,12 199:14 <b>raised</b> [4] 7:7 116:16 131:11 173:22 <b>raising</b> [1] 191:1 <b>ramifications</b> [1] 144:24 <b>random</b> [1] 184:13 <b>range</b> [1] 23:13 <b>rare</b> [1] 74:14 <b>rather</b> [8] 21:24 50:19 57:8 66:14 71:6 72:23 115:20 170:13 <b>rational</b> [19] 88:15,23 106:13,17 115:2 122:23 139:18 140:5 141:15,17,25 151:10 155:3,7 170:18,21 171:21 172:4,5 <b>rationale</b> [1] 157:24 <b>rationally</b> [11] 18:8,10 105:22 106:7,12 107:17 110:8 140:16 141:24 175:4 176:22 <b>reach</b> [1] 136:3 <b>reached</b> [1] 95:23 <b>reaction</b> [2] 87:1,2 <b>read</b> [2] 25:18 87:4 <b>reading</b> [2] 47:23 74:2 <b>real</b> [10] 33:1 184:15,25 185:1,5 190:14,23 196:19 202:21,25 <b>real-world</b> [1] 110:25 <b>realizes</b> [1] 183:6 <b>really</b> [20] 28:1,8 36:16 46:22 47:13 49:24 74:1,13 87:12,21,25 91:5 105:19 114:19 160:4 179:12 190:7 194:16 198:24 201:5 <b>rearing</b> [1] 36:9 <b>rears</b> [1] 5:3 <b>reason</b> [15] 80:22 86:18 116:5 122:24 123:1,1 131:22 166:9 169:6 176:21 182:16,17 187:21 201:3 202:19 <b>reasonable</b> [8] 106:7,11,25 113:19 115:20 117:4</p>	<p>123:1,8 <b>reasonableness</b> [1] 106:9 <b>reasonably</b> [8] 107:2 109:18 113:13,14,19,20 140:20 157:25 <b>reasons</b> [9] 8:25 30:22 53:1 127:21 130:20 131:7 171:20 185:21 194:21 <b>rebut</b> [1] 165:22 <b>rebuttable</b> [2] 117:22,24 <b>REBUTTAL</b> [2] 3:15 203:15 <b>rebutted</b> [2] 121:7,12 <b>recall</b> [3] 54:10,12 67:25 <b>received</b> [1] 57:9 <b>receiving</b> [1] 111:15 <b>recent</b> [1] 53:17 <b>recognition</b> [3] 94:22 135:9,19 <b>recognize</b> [5] 52:16 54:6 106:19 144:9 182:23 <b>recognized</b> [29] 9:19 24:24 25:1 40:24 41:19 53:20 54:9 66:2 69:25 71:24 78:12,22 81:5 95:10,25 103:13 105:12 125:4 126:25 163:21 170:10,10,14 173:24 174:17 175:12 176:19 182:19 206:17 <b>recognizes</b> [1] 92:15 <b>recognizing</b> [1] 144:16 <b>record</b> [1] 193:16 <b>recordkeeping</b> [5] 62:13 64:4 66:16 191:10 200:15 <b>redressability</b> [1] 185:21 <b>reduces</b> [1] 44:20 <b>reelected</b> [1] 122:20 <b>reemphasize</b> [1] 191:14 <b>refer</b> [2] 28:13 102:24 <b>reference</b> [3] 34:6,8 158:14 <b>referred</b> [4] 17:17 127:19 152:8,11 <b>referring</b> [4] 10:8 28:16 34:12 136:18 <b>reflected</b> [2] 147:20 193:8 <b>reflects</b> [2] 47:25 119:3 <b>Reg</b> [1] 48:4 <b>regard</b> [1] 17:15 <b>regarding</b> [10] 17:25 62:21 64:1,3 73:8 75:24 76:2,22 93:17 101:15 <b>regardless</b> [4] 31:12 82:11 118:22 187:23 <b>regards</b> [2] 106:23 160:7 <b>regime</b> [1] 55:16 <b>Register</b> [2] 47:24 48:5 <b>regs</b> [2] 186:9,13 <b>regulate</b> [28] 14:14 15:19 16:6,11 18:19 24:11,21 25:15 27:20 29:25 30:3,5 33:22 34:2,20,22 35:2,13 36:23 64:19 82:9 86:19 100:21,24 101:1 109:8 157:23</p>	<p>161:11 <b>regulated</b> [2] 37:3 56:22 <b>regulates</b> [5] 26:21,24 38:17 77:13 190:13 <b>regulating</b> [24] 22:10,11 23:5,6,22,23 25:7,8 26:23 27:21 30:6 35:16 45:21 48:7 51:11,13 52:17 55:20,24 68:4 71:6 145:7,8 148:22 <b>regulation</b> [20] 6:4,15 7:1,11,17 13:2,4 18:16 21:1 22:7,9 45:8 47:15,20 51:8 52:20 68:3 70:9 79:24 101:20 <b>Regulations</b> [9] 6:8 11:17 17:18,25 19:1 57:13 58:4 77:20 138:12 <b>regulatory</b> [2] 5:11 205:3 <b>rehabilitation</b> [3] 46:11 196:4,8 <b>reinforces</b> [1] 143:24 <b>reiterate</b> [1] 159:5 <b>reject</b> [1] 31:17 <b>rejected</b> [5] 65:24,24 127:24 128:5 163:15 <b>relate</b> [2] 28:2 68:23 <b>related</b> [24] 24:12 28:3 47:20 50:11 53:11 54:4 66:14 70:12 71:16,20 96:9 100:2 105:23 106:7,13 107:18 109:18 110:8 140:16 141:24 149:5 157:25 160:14 205:9 <b>relating</b> [2] 27:14 68:16 <b>relations</b> [5] 50:8 69:9,17 71:12 75:11 <b>relationship</b> [29] 9:18 15:13 25:3,16 51:17,23 52:4,10,15,23 75:25 76:7,7,9,19 77:14 115:9 127:11 133:9 135:11 149:22,23,23 151:8 160:25 170:12,15 172:15 206:6 <b>relationships</b> [4] 10:12 102:17,18 159:12 <b>relative</b> [2] 126:13 192:5 <b>relatively</b> [2] 53:17 54:1 <b>relevant</b> [3] 57:17 88:22 90:10 <b>reliance</b> [1] 105:12 <b>relies</b> [1] 163:23 <b>religious</b> [2] 77:25 80:6 <b>rely</b> [1] 101:14 <b>relying</b> [2] 102:14 148:9 <b>remain</b> [9] 19:3 82:1 118:20 123:12,15 163:24 172:2 206:7 207:23 <b>remains</b> [1] 139:16 <b>remarkable</b> [1] 6:5 <b>remedial</b> [3] 46:11 164:6 196:3 <b>remediateable</b> [1] 183:10 <b>remedy</b> [3] 39:23 94:3,6 <b>remember</b> [5] 42:23 170:</p>	<p>23 174:17 185:2 202:14 <b>removal</b> [3] 92:17 166:23 179:16 <b>removals</b> [1] 165:2 <b>remove</b> [3] 125:5,6 181:19 <b>removed</b> [1] 101:18 <b>removing</b> [1] 126:17 <b>renders</b> [3] 113:1 159:16 170:13 <b>Reno</b> [2] 190:12,17 <b>Reorganization</b> [1] 181:12 <b>repeat</b> [1] 194:22 <b>repeatedly</b> [1] 17:16 <b>replaces</b> [1] 4:16 <b>replicated</b> [1] 38:7 <b>report</b> [3] 24:4 168:14 206:4 <b>represent</b> [2] 56:17 59:9 <b>representing</b> [1] 56:16 <b>requesting</b> [1] 81:3 <b>require</b> [4] 55:15 96:19 115:21 133:5 <b>required</b> [6] 57:1 63:11 111:14 122:23 168:13 199:5 <b>requirement</b> [6] 58:13 66:16 67:8 200:9 204:6,15 <b>requirements</b> [2] 61:3 96:14 <b>requires</b> [7] 46:7 58:15 82:21 84:20 131:20 197:7 200:13 <b>requiring</b> [2] 40:5 62:3 <b>research</b> [2] 191:9 192:19 <b>resemble</b> [1] 119:5 <b>reservation</b> [30] 19:7 23:14,22 24:14 35:14 43:6,10 48:24 71:11 77:18,21,24,25 90:9 96:8 116:17 118:21 119:23 132:2 146:3 151:17 168:16,21,23 169:2 171:6 173:7 178:13 183:23 184:11 <b>reservations</b> [21] 14:25,25 15:14 24:12,12 25:22 56:3 69:11 78:22 85:8 89:4,8,14 90:7 96:19 132:9 167:15 178:4 185:8 193:25 194:4 <b>reserved</b> [2] 62:15,16 <b>reside</b> [2] 23:14 43:17 <b>residence</b> [2] 9:3,9 <b>resident</b> [1] 41:8 <b>residual</b> [1] 51:13 <b>resisted</b> [1] 163:12 <b>resolve</b> [2] 100:16 203:8 <b>resonate</b> [1] 174:9 <b>resource</b> [1] 17:22 <b>respect</b> [34] 10:11 16:3 22:18 25:14 37:9,17 39:2,21,24 41:6 50:23 52:14 53:9 65:2 67:2 88:1 91:12 93:2,24 94:19 114:10 117:9</p>
---	---	---	--	--

## Official - Subject to Final Review

<p>119:19 120:2 141:9,23 150:21 153:21 158:12 160: 6 166:16 188:20 189:15 199:12 <b>Respectfully</b> [2] 71:13 205:3 <b>respects</b> [1] 104:4 <b>respond</b> [4] 87:1 91:4 174: 23 193:23 <b>Respondents</b> [4] 1:11,22 63:8 103:3 <b>response</b> [10] 15:17 18:22 33:12 42:18 47:18 97:5 102:12 103:15 157:19 201: 3 <b>responses</b> [3] 18:6 42:20 48:18 <b>responsibility</b> [7] 107:3 109:17 127:12,13 160:25 161:16 163:13 <b>responsible</b> [1] 51:24 <b>rest</b> [2] 86:7 135:9 <b>restraints</b> [1] 158:7 <b>restrictions</b> [2] 17:17 190: 5 <b>rests</b> [2] 64:18 135:6 <b>result</b> [1] 51:25 <b>resulted</b> [2] 103:16 165:1 <b>results</b> [2] 60:3 87:7 <b>return</b> [1] 173:20 <b>returned</b> [1] 183:16 <b>returns</b> [1] 87:9 <b>review</b> [3] 141:15 185:22 201:25 <b>reviewable</b> [1] 63:13 <b>reviewing</b> [1] 113:8 <b>revised</b> [2] 100:23,25 <b>RFRA</b> [1] 80:23 <b>Rice</b> [25] 22:6 27:17,23 28: 6,12,12,23,23 29:15,17,18, 20 30:9,10 45:7,7,14 95:18, 21,24 206:10,14,19,25 207: 10 <b>Rice's</b> [1] 207:1 <b>rights</b> [16] 15:1 17:4 26:24 28:18 41:12 46:9 51:15 59: 2 97:9 109:10 166:10 181: 11 187:8,20 188:4 189:19 <b>rise</b> [2] 10:17 104:17 <b>riven</b> [1] 63:15 <b>ROBERTS</b> [84] 4:3 10:23 11:22 22:25 23:2 25:10 27: 10 33:8 42:15 45:25 47:9 55:2,8 83:17 84:12 86:24 88:25 94:11 96:25 98:11 103:6 106:12 107:4,6 111: 2,4 112:3,5,9,15,19 113:3, 12,16,23 114:8 115:3,24 117:2,12,19,24 118:5,10, 17 119:9 120:6,13,23 121: 3,11 124:16,21 125:24 126: 2,7,10 127:8,10 136:11 142:9 144:21 148:3 159: 22 162:17 164:17 173:18</p>	<p>174:8,20 175:25 176:7,10 183:17,19 184:1,16 185:10 188:16 191:24 195:19 200: 25 203:10,14 208:5 <b>Roberts'</b> [1] 122:6 <b>role</b> [6] 16:12,13 39:16 45: 21 91:7 160:4 <b>root</b> [1] 194:17 <b>rooted</b> [2] 29:1 206:18 <b>routinely</b> [2] 180:16 181: 13 <b>rule</b> [15] 5:25 11:10 21:16 61:20 67:15 70:13 77:5,11 92:12 95:23 108:5 159:19 168:6 204:5,6 <b>ruled</b> [5] 19:8 41:1,5 43:7 48:25 <b>rules</b> [4] 61:17 102:25 110: 2 111:11 <b>ruling</b> [2] 186:18 187:3 <b>running</b> [2] 123:21 195:12</p> <p style="text-align:center"><b>S</b></p> <p><b>sacred</b> [1] 77:24 <b>safety</b> [5] 11:14,15 98:2 163:7 164:5 <b>saga</b> [1] 93:5 <b>sale</b> [4] 70:7,8 78:2 168:16 <b>Salerno</b> [1] 139:7 <b>sales</b> [4] 70:6 127:23 167: 14 168:15 <b>same</b> [22] 10:25 24:16 27: 12 37:16 58:11 64:2 80:22 81:6,10 86:18 91:4 93:23 107:18 120:18 122:21 132: 2 133:6 135:8,9 151:17 178:8 206:10 <b>satisfy</b> [3] 46:9 155:7 175: 9 <b>save</b> [1] 186:9 <b>saw</b> [3] 96:5 161:25 162:2 <b>saying</b> [39] 26:25 27:3 32: 21 38:4,24 52:4,8,13,22 58: 25 59:22 69:10 74:12 75:2 92:6 93:20 98:1,7 118:18 119:21 121:5,12 124:9 133:16 134:10,14 139:14 140:8 146:25 156:22 157: 15,21 161:9,13 176:4,6 181:25 195:23 198:5 <b>says</b> [41] 6:3,4,14 8:17,21 12:24 17:2 29:1 34:6 46: 14 47:24 65:6 80:16 83:11, 24 86:10,14,19 92:11 99: 16 101:19 116:9 121:8 128:22 138:9 144:1 145:4 161:18 175:10,21 177:14 183:9 187:1 192:23 193:3 196:6 197:12 203:25 204: 20 205:1 206:5 <b>Scalia</b> [1] 62:20 <b>scene</b> [1] 120:25 <b>scheme</b> [2] 56:5 187:17 <b>school</b> [7] 93:5 108:18 140:</p>	<p>24 161:24 183:1,1 193:5 <b>schools</b> [7] 26:4 39:25 40: 2,5,7 93:9 145:22 <b>scope</b> [11] 13:8 17:6,12 18: 4 43:23 50:1 115:15 160:6 171:2 194:8 202:4 <b>scrutiny</b> [9] 88:15,18 140:4 141:14 146:21 155:3,7,9 156:1 <b>searching</b> [1] 50:20 <b>Seber</b> [2] 104:17 108:11 <b>second</b> [22] 5:3,6,9 18:12 32:11 44:10 55:22 57:6 60: 13 62:8 71:23 73:6 82:17 96:5 120:9 131:24 134:5,6, 18 143:1 163:14 186:1 <b>second-guess</b> [2] 32:5,14 <b>secondly</b> [2] 117:21 193: 21 <b>SECRETARY</b> [2] 1:15 110: 18 <b>section</b> [8] 8:20 9:10 41:6 60:6 80:14 92:18 118:13 168:11 <b>sections</b> [1] 57:13 <b>Security</b> [1] 57:8 <b>Sedition</b> [1] 63:10 <b>see</b> [9] 85:17 99:18 108:1 148:10 154:24 177:1 187: 19 190:6 206:11 <b>seeing</b> [1] 105:2 <b>seek</b> [4] 7:24 8:1,6 97:17 <b>seeking</b> [4] 46:8 97:9 139: 3 204:20 <b>seeks</b> [1] 205:14 <b>seem</b> [8] 22:22 52:23 77:18, 22 78:1 91:1 174:8 196:20 <b>seemed</b> [2] 49:16 50:10 <b>seems</b> [13] 48:6 53:24 56: 15 62:14 64:24 66:14 99: 21 142:15 143:3 157:12 165:11 203:3,7 <b>seen</b> [2] 168:22 185:4 <b>selected</b> [1] 131:21 <b>self</b> [2] 17:19 40:21 <b>self-govern</b> [1] 14:13 <b>self-governance</b> [4] 18:2, 24 40:16 207:8 <b>self-governing</b> [2] 48:2,9 <b>self-government</b> [27] 17: 6,9,20 19:7 30:7,11,13,16 40:25 43:4 44:9,17 45:1,5, 17 47:16,17,22 48:22 49:4 94:20 96:9 177:11 179:10, 18,22 207:11 <b>self-regulation</b> [1] 18:25 <b>Seminole</b> [4] 18:9 42:21 65:23 159:2 <b>send</b> [3] 8:19 9:1 205:12 <b>sending</b> [1] 4:20 <b>sense</b> [12] 13:12 14:3 45:2 135:7 168:6,7 169:3,4,8 178:25 180:17 181:23 <b>sensible</b> [2] 169:11 190:21</p>	<p><b>sentence</b> [2] 193:22 195: 13 <b>separate</b> [6] 15:21,24 21:2 22:3,4 114:23 <b>separated</b> [1] 172:8 <b>separating</b> [1] 182:19 <b>separation</b> [1] 103:17 <b>series</b> [5] 75:4,6 82:14 155: 23 202:11 <b>serious</b> [8] 26:1,5 103:15 141:1 172:24,25 177:17 199:14 <b>Seriously</b> [1] 108:24 <b>serve</b> [3] 96:11 106:15 114: 11 <b>service</b> [3] 82:19 106:4 145:21 <b>servicemen</b> [1] 167:25 <b>services</b> [9] 46:11 61:22, 25 96:13 115:16 145:15 164:6 196:3,21 <b>serving</b> [2] 62:25 96:14 <b>session</b> [1] 8:20 <b>set</b> [14] 14:22,24 99:25 102: 25 105:4 125:9 153:5 161: 6,7 162:5,9 176:20 189:7 208:3 <b>set-aside</b> [1] 95:23 <b>sets</b> [2] 85:2 92:13 <b>setting</b> [4] 14:19 82:23 85: 12 165:21 <b>seven</b> [1] 63:7 <b>severable</b> [2] 171:22 173: 17 <b>several</b> [10] 71:1 102:11 104:3 112:22 116:20 169: 15,18 173:22 204:13,25 <b>shackles</b> [2] 147:16,16 <b>shackling</b> [1] 147:9 <b>shall</b> [7] 6:18 57:18 74:23 92:7,12 121:9 161:10 <b>shameful</b> [1] 93:18 <b>share</b> [3] 132:2 170:11 172: 16 <b>shared</b> [1] 100:2 <b>shares</b> [2] 87:16 170:15 <b>sharply</b> [1] 11:10 <b>shedding</b> [1] 147:15 <b>shift</b> [1] 101:6 <b>short</b> [2] 53:8 187:15 <b>shorthand</b> [1] 184:22 <b>shouldn't</b> [4] 10:1 74:20 123:8 160:11 <b>show</b> [3] 5:9 18:14 196:2 <b>showed</b> [1] 64:9 <b>showing</b> [3] 6:19 11:2 12: 24 <b>shown</b> [6] 6:2,11 12:11 13: 3 20:24 202:23 <b>shows</b> [3] 105:7 180:13,15 <b>shrink</b> [1] 81:4 <b>sibling</b> [1] 166:3 <b>side</b> [9] 12:6 40:20 41:13 44:19 76:25 81:16 88:16</p>	<p>96:22 101:14 150:14 153: 22,23 155:20 171:14 179: 21 186:16 191:9 202:9 205:1 <b>sides</b> [1] 160:1 <b>significant</b> [2] 57:22 96:6 <b>similar</b> [3] 56:25 91:12 170: 5 <b>similarities</b> [2] 153:8 172: 9 <b>similarity</b> [1] 172:14 <b>similarly</b> [1] 69:12 <b>simple</b> [1] 112:16 <b>simply</b> [6] 24:20 43:20 45: 22 78:24 79:18 105:1 <b>since</b> [8] 12:15 41:15 56:15 103:20 105:7 106:20 163: 6 180:21 <b>single</b> [6] 185:3,23 186:2 189:4,4 194:2 <b>singled</b> [1] 181:13 <b>Sioux</b> [1] 132:6 <b>sites</b> [2] 77:24 80:7 <b>situation</b> [11] 27:24 97:13 118:7 132:4 138:23 149:3 171:16 175:18 188:1 189: 9 203:7 <b>situations</b> [2] 132:1 173:5 <b>six</b> [2] 95:19 192:3 <b>six-month-old</b> [2] 116:3,9 <b>six-years-old</b> [1] 182:24 <b>smaller</b> [1] 63:2 <b>Smith</b> [1] 124:14 <b>smoking</b> [1] 205:25 <b>smoothly</b> [1] 150:12 <b>snatched</b> [1] 99:8 <b>Social</b> [2] 57:8 61:25 <b>society</b> [1] 155:18 <b>socioeconomic</b> [2] 6:13 166:7 <b>soil</b> [1] 71:25 <b>sole</b> [1] 6:19 <b>solely</b> [1] 137:1 <b>Solicitor</b> [2] 2:9,11 <b>solution</b> [2] 106:24 193:19 <b>solve</b> [2] 61:18 160:22 <b>solving</b> [1] 99:13 <b>somebody</b> [6] 21:5 23:9 58:24 133:11 135:25 138: 4 <b>somehow</b> [2] 69:21 171: 11 <b>someone</b> [10] 23:6,23 24: 13,18 59:1 125:7 133:22 137:24 157:1 198:2 <b>sometimes</b> [12] 5:1 67:6,7 69:1,14,17 76:6 120:22 156:12,13 183:8 191:17 <b>somewhere</b> [1] 126:19 <b>soon</b> [2] 182:21 183:8 <b>sorry</b> [16] 20:14 22:23 29: 11 33:24 53:7 66:12 77:10 116:21 123:14 124:21 154: 15 195:9,10,11 198:15 203:</p>
---	--	---	--	--

## Official - Subject to Final Review

<p>12</p> <p><b>sort</b> [24] 29:6,13 49:20 53:21 65:3 66:7 90:7,16 98:5 99:20 100:17 110:21 114:15,23 125:1 135:25 158:11 165:15,17 166:16 179:11 180:24 190:18 202:9</p> <p><b>sorts</b> [1] 143:18</p> <p><b>SOTOMAYOR</b> [79] 6:25 7:4,9,14,19,24 8:5,10 9:4,16,25 10:9 14:17 15:23 25:11,12,21 26:8,10,25 27:6,8 37:11 58:20 59:6,22 60:11,18,21,23 61:7 74:25 82:13 83:3,7,10,20,23 84:2,9,16,19 85:1,11,21,24 86:2,9,17,22 102:10 122:4,14,17 123:9,15,20,24 124:2,7,19,23 125:25 142:10,11,25 143:7,10,16,25 144:11,20 179:3,6,24 180:2,6,10 185:13</p> <p><b>sought</b> [2] 8:3 96:11</p> <p><b>sound</b> [1] 139:16</p> <p><b>sounds</b> [4] 80:10 84:8 141:12,13</p> <p><b>sources</b> [1] 102:21</p> <p><b>sovereign</b> [22] 14:11 16:13 17:3 26:22 28:17 39:7 48:2,9 51:14,19,19,21 52:7 65:22 66:8 68:3 75:21 91:18 137:14 158:4 159:2 163:23</p> <p><b>sovereigns</b> [11] 22:4 37:7,12,13 72:7 91:8,13,14,19 92:6 104:8</p> <p><b>sovereignty</b> [13] 15:11 17:9,20 27:2 51:22 65:13 73:12 144:14,16 154:21 155:1 160:15,16</p> <p><b>speaking</b> [6] 57:23 71:5 72:1 76:23 91:16 100:17</p> <p><b>speaks</b> [6] 37:10,13 68:7 77:1,1 191:17</p> <p><b>Spear</b> [1] 20:25</p> <p><b>special</b> [12] 25:3 71:2 73:6 98:15 99:4,13 100:10 114:9 115:9 175:4 194:2,18</p> <p><b>specific</b> [3] 11:17 57:24 62:17</p> <p><b>specifically</b> [16] 61:19 62:2,9,18 63:6 66:7 68:7 71:5,25 73:5 76:24 85:5 101:14,21 102:22 128:5</p> <p><b>spend</b> [1] 5:19</p> <p><b>Spending</b> [6] 38:14 39:1 81:14,24,25 82:2</p> <p><b>sphere</b> [1] 207:13</p> <p><b>spiritual</b> [3] 135:17 152:11,22</p> <p><b>spoke</b> [1] 81:9</p> <p><b>sports</b> [2] 183:2 193:4</p> <p><b>spot</b> [1] 21:22</p> <p><b>sprung</b> [1] 180:17</p> <p><b>squared</b> [1] 206:25</p>	<p><b>squarely</b> [1] 81:23</p> <p><b>stability</b> [2] 153:15,16</p> <p><b>stake</b> [1] 6:21</p> <p><b>stand</b> [2] 35:12 148:17</p> <p><b>standard</b> [38] 5:11,20 8:7,13 9:6,9,22 11:6,6,9,13 12:14,23 14:19,22 20:9,23 85:2 88:14,23 116:24 117:5 125:3 126:12 139:19 157:25 159:19 164:10,25 165:6,17 166:12 175:4 182:18 201:25 202:10 207:25 208:2</p> <p><b>standards</b> [5] 8:21 105:1 117:8 161:21 162:4</p> <p><b>standing</b> [23] 20:4 21:22 32:20 56:14,18 57:4 58:23 60:1 163:16 185:17,20 186:16,22,22,24 187:3,4,14 188:6,10,11,11 203:7</p> <p><b>stands</b> [1] 57:6</p> <p><b>starkly</b> [1] 202:18</p> <p><b>start</b> [15] 25:19 28:11 48:22 50:22 74:11 78:8 100:13 108:4,5 163:2 164:12 187:5 190:13 203:5,20</p> <p><b>started</b> [2] 59:23 194:21</p> <p><b>starting</b> [1] 67:17</p> <p><b>starts</b> [4] 20:8 29:20 161:9 203:22</p> <p><b>state</b> [101] 4:13 8:13 9:22 12:1 13:19 15:3 20:5,12,17 21:9 22:8,11 29:24 30:6 41:14,19,19,22 42:10 44:12 45:11,13 46:15,16,18 52:18 54:16 55:17 56:3 57:16 58:18,21,23 62:3 63:21,21 65:22 67:5,6,13 68:7 78:24 80:17 82:9,9 83:11 84:2,20,23 85:13,25 86:10 87:15 91:13 92:11 93:17 97:6 99:5,14 100:1 103:23 104:25 105:3 108:5 112:8 116:25 117:13,13 119:15 129:19,23 138:24 145:19 150:16 159:2 160:23 161:21 162:12,25 163:1,5 165:5,13 167:1,1,24 185:23,24 186:18 189:25 190:15,19 191:3 195:24 196:21 197:6 204:12 205:2 206:20,20 207:14,14</p> <p><b>state's</b> [1] 39:16</p> <p><b>state-recognized</b> [1] 174:19</p> <p><b>state-run</b> [1] 196:6</p> <p><b>stated</b> [1] 73:5</p> <p><b>statement</b> [1] 185:15</p> <p><b>statements</b> [3] 88:4 160:12,18</p> <p><b>STATES</b> [95] 1:1 2:3 6:7 14:16 16:7 24:19 37:9 38:17 39:2,3,6 41:12 43:16,16 46:23,25 47:3,5 50:9,14</p>	<p>51:7,8,21 53:22 54:4,10 55:15 56:5,7,9,25 58:13,15 60:9 61:14,20,22,24 62:6 63:4,18,19,25 64:17,20 65:1,5,10 66:8 68:15 75:20 76:10,15,20 77:6 85:6 86:15,20 89:16 91:22,24 92:5,6,7,18 96:15 99:24 100:22 104:9,13 105:7,14 110:1 122:7,9 133:9 135:12 137:6,18 139:13 144:14 149:10 163:9,11,12 166:10,22 170:12 172:15 181:5 189:5,18 190:6,17,23</p> <p><b>states'</b> [2] 41:12 105:1</p> <p><b>statewide</b> [1] 167:18</p> <p><b>statistics</b> [1] 87:11</p> <p><b>status</b> [7] 104:8 106:1 109:17 122:1 137:1 166:7 207:25</p> <p><b>statute</b> [47] 7:15 8:3,4 21:4,6,9,17 23:16 30:10,18,19,22 31:2 37:23 39:23 40:5 49:10 58:4 82:16,19 83:8,10 85:17 86:7,10,15 110:11 118:25 129:18 139:12 141:10 158:10 162:12 163:18 165:11 171:18 186:12,14 190:22,22 191:19 192:6,7,10,21 203:1,6</p> <p><b>statute's</b> [1] 207:10</p> <p><b>statutes</b> [8] 26:9 74:2 76:14 82:15 161:14 181:10 202:3,3</p> <p><b>stay</b> [1] 65:10</p> <p><b>stays</b> [1] 82:22</p> <p><b>steak</b> [2] 171:24 172:1</p> <p><b>step</b> [1] 146:21</p> <p><b>steps</b> [2] 46:18 57:12</p> <p><b>stereotypes</b> [1] 208:3</p> <p><b>still</b> [10] 26:2 49:6 90:17 129:9,12,14,15 155:11,12 194:5</p> <p><b>STONE</b> [102] 2:9 3:7 55:10,11,13 56:13,19 59:3,18 60:2,14,20,22,25 61:9,17 62:16 64:11 65:14,16 66:10,18,22 67:10,19,23 68:6,18 69:6,15,18,23 70:16,21,25 71:13 72:18,23 73:4 74:15 75:23 78:7,18 79:3,6,10,15,17,22 80:2,9,13,18,21 81:3,15,25 82:7 83:1,5,9,16,18,21,25 84:6,24 85:4,16,23 86:1,5,14,18 88:2,11 89:5,10 90:4,20,23 91:15 92:4,14,22 93:8,14,22 94:1 95:15 97:2,19 98:19 99:1 100:12 101:11 102:13 145:4 146:25 197:1,7 198:12</p> <p><b>Stone's</b> [1] 145:2</p> <p><b>stop</b> [3] 24:8 97:24 141:13</p> <p><b>stops</b> [1] 122:14</p> <p><b>Story</b> [4] 75:1,25 77:8 102:</p>	<p>20</p> <p><b>Story's</b> [2] 76:24 77:4</p> <p><b>straight</b> [1] 165:16</p> <p><b>strange</b> [1] 97:22</p> <p><b>street</b> [1] 19:22</p> <p><b>strict</b> [5] 88:15,18 146:21 155:9 156:1</p> <p><b>strictly</b> [2] 68:23 70:11</p> <p><b>strike</b> [2] 111:12 171:17</p> <p><b>strikes</b> [2] 74:9 79:7</p> <p><b>striking</b> [1] 78:6</p> <p><b>strong</b> [6] 130:20 153:12,21,23 160:1 181:22</p> <p><b>strongly</b> [1] 179:20</p> <p><b>struck</b> [2] 158:10 191:21</p> <p><b>structure</b> [5] 50:11 51:6,10 54:7 104:7</p> <p><b>structured</b> [3] 64:25 101:7 164:2</p> <p><b>struggling</b> [6] 19:13 22:21 29:14 40:18 154:14,16</p> <p><b>studied</b> [1] 177:3</p> <p><b>subject</b> [7] 10:15 112:23 120:11 129:15 155:2 156:1 158:23</p> <p><b>subjected</b> [2] 96:20 207:24</p> <p><b>subjective</b> [2] 116:25 121:24</p> <p><b>subjects</b> [1] 143:1</p> <p><b>subjugating</b> [1] 16:13</p> <p><b>submission</b> [4] 14:8 16:3 26:20 40:12</p> <p><b>submit</b> [3] 24:1 171:15 205:19</p> <p><b>submitted</b> [4] 100:20 203:11 208:6,8</p> <p><b>subordinated</b> [1] 118:8</p> <p><b>subordinates</b> [1] 87:6</p> <p><b>substance</b> [1] 183:12</p> <p><b>substantial</b> [1] 57:7</p> <p><b>substantially</b> [1] 190:10</p> <p><b>substantive</b> [5] 61:22 97:20,21 109:25 197:7</p> <p><b>success</b> [1] 94:20</p> <p><b>sudden</b> [1] 184:14</p> <p><b>suddenly</b> [1] 53:25</p> <p><b>sue</b> [1] 20:17</p> <p><b>sued</b> [1] 20:4</p> <p><b>suffrance</b> [2] 73:13,15</p> <p><b>suffers</b> [2] 58:19 59:19</p> <p><b>sufficient</b> [9] 5:15 6:18 47:17,21 48:10,15 110:6 138:14 178:21</p> <p><b>sufficiently</b> [3] 65:21 145:18 170:4</p> <p><b>suggest</b> [3] 43:8 152:13 205:3</p> <p><b>suggested</b> [6] 51:6 95:4 113:5 150:11 183:25 184:2</p> <p><b>suggesting</b> [4] 16:20 25:13 26:12 32:20</p> <p><b>suggestion</b> [2] 174:1 186:</p>	<p>8</p> <p><b>suggests</b> [3] 175:9 194:9 205:8</p> <p><b>sui</b> [2] 25:2 45:20</p> <p><b>suit</b> [1] 190:2</p> <p><b>suitable</b> [1] 131:23</p> <p><b>summarize</b> [1] 157:15</p> <p><b>supersede</b> [1] 9:22</p> <p><b>supplied</b> [1] 122:9</p> <p><b>supply</b> [2] 113:5 122:8</p> <p><b>Suppose</b> [5] 68:14 125:20 128:19 177:14 195:15</p> <p><b>supposed</b> [3] 6:22 48:13 88:1</p> <p><b>supposition</b> [1] 158:14</p> <p><b>SUPREME</b> [2] 1:1 2:3</p> <p><b>surface</b> [1] 87:13</p> <p><b>surprise</b> [1] 192:21</p> <p><b>surrounding</b> [1] 87:11</p> <p><b>survive</b> [2] 48:3 202:3</p> <p><b>sweep</b> [1] 173:14</p> <p><b>sweeping</b> [1] 156:5</p> <p><b>sweet</b> [1] 133:14</p> <p><b>syllogism</b> [1] 102:14</p> <p><b>system</b> [9] 164:1 165:3 199:3 200:7,10,12 204:3,8,12</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>talked</b> [3] 75:5,14 89:13</p> <p><b>talks</b> [1] 206:4</p> <p><b>tangent</b> [1] 174:25</p> <p><b>tasked</b> [1] 20:6</p> <p><b>tax</b> [2] 108:12,14</p> <p><b>team</b> [1] 193:5</p> <p><b>teams</b> [1] 183:2</p> <p><b>teeing</b> [1] 114:19</p> <p><b>teenage</b> [1] 187:23</p> <p><b>teeth</b> [2] 102:5 147:14</p> <p><b>tens</b> [2] 74:4,4</p> <p><b>Tenth</b> [1] 54:8</p> <p><b>term</b> [2] 56:21 113:21</p> <p><b>termination</b> [2] 46:9 97:9</p> <p><b>terms</b> [7] 31:3 54:3 64:21 137:17 153:12 155:25 160:13</p> <p><b>terrible</b> [3] 87:23 93:18 94:2</p> <p><b>territorial</b> [1] 96:13</p> <p><b>territorially</b> [1] 14:21</p> <p><b>territories</b> [2] 55:23 85:6</p> <p><b>territory</b> [5] 15:6 55:7 71:19 93:10,20</p> <p><b>test</b> [12] 4:16,16 5:13 10:2,2 11:19,21 105:22 106:13 113:10 141:25 176:20</p> <p><b>tests</b> [1] 205:6</p> <p><b>tether</b> [4] 44:8,17 47:17 48:15</p> <p><b>TEXAS</b> [43] 1:12 2:9,10 3:8 12:8 13:19 55:12 56:21 57:6,6,9,11,15,20 58:18 59:17,19 61:3 97:11,16,16,20,21 98:7 187:7,8,16 188:3 189:</p>
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## Official - Subject to Final Review

4,23 196:6 197:6,12 198:1, 3,9,19 199:4,13 204:10,13 205:19,21 <b>Texas's</b> [6] 61:2 87:3,14, 16 88:4 187:12 <b>text</b> [3] 49:9 104:4 194:19 <b>textual</b> [1] 205:25 <b>Thanks</b> [1] 47:8 <b>themselves</b> [9] 17:13 28: 20 39:3,8 56:17 60:15 71: 7 207:5,19 <b>theories</b> [1] 144:25 <b>theory</b> [1] 58:21 <b>there's</b> [56] 5:21,22 8:6 9:6 12:24 15:8 17:22 26:2 34: 17 37:12 41:23 47:12 51: 17 58:5 70:17 72:21,25 80: 10,25 85:21,23 88:13 92:4 103:24 107:24 112:11,23 113:3 115:16 116:3 124: 16,17 131:22 132:3 134:13, 14 137:19 143:17 145:20, 22 154:11 158:13 165:9,16, 20 171:25 172:2 178:6 180:16,16 184:16 192:7 200:9 202:15,16 206:13 <b>therefore</b> [10] 48:10 50:24 51:23 56:10 76:19 101:19 102:18 159:17 177:18 179: 2 <b>They've</b> [2] 92:2 183:4 <b>thinking</b> [3] 134:21 160:5 198:19 <b>thinks</b> [2] 30:18 44:23 <b>thinness</b> [1] 63:6 <b>third</b> [33] 18:7 43:2 49:13 55:24 60:24 72:2 73:6,8 130:1,6,15 131:11 133:5, 20,21 134:8,12,16,19 135: 4,20 148:8 151:1,15 163: 25 183:20 186:7 191:3,13 202:6,7 205:7,23 <b>third-party</b> [3] 187:13,20, 21 <b>THOMAS</b> [14] 5:19,24 23:3, 4,11,17,20 24:7 26:12,17 56:12 59:7 84:14 185:11 <b>Thomas's</b> [1] 15:21 <b>though</b> [3] 84:8 149:17 171:19 <b>thousands</b> [2] 4:24 192:4 <b>threatened</b> [1] 30:23 <b>three</b> [18] 42:23 55:18 69: 24 70:17 71:15 72:10,16 73:1,23,23 74:23 75:13 145:9 163:1,19 165:13 192:5 202:23 <b>threshold</b> [1] 126:11 <b>thrive</b> [1] 183:15 <b>thriving</b> [2] 32:1,22 <b>throughout</b> [7] 89:14,15 93:3,25 144:7 164:21 175: 13 <b>thwart</b> [1] 100:7	<b>tie</b> [4] 30:11,13 45:17 207:8 <b>tied</b> [4] 157:13 167:23 175: 4 176:22 <b>ties</b> [2] 135:17 172:22 <b>Tiger</b> [1] 71:3 <b>tip-off</b> [1] 195:14 <b>Title</b> [9] 35:4 77:12 78:5,20, 25 80:19 90:14 145:13 180:11 <b>today</b> [3] 68:24 82:6 200: 21 <b>tomorrow</b> [2] 38:6 109:1 <b>took</b> [9] 19:15 53:10 75:20, 21 90:20 93:12 95:16 115: 20 146:25 <b>top</b> [1] 10:1 <b>torn</b> [1] 162:24 <b>torts</b> [1] 110:2 <b>touched</b> [3] 87:13 170:22 179:14 <b>touches</b> [1] 37:3 <b>touchstone</b> [1] 206:6 <b>traceability</b> [2] 20:9,23 <b>track</b> [1] 73:6 <b>trade</b> [15] 13:13 14:23 15: 12 55:20 77:2 84:19 85:2 101:20,21,24 102:9,15 147: 21 168:9 194:20 <b>traditional</b> [1] 11:20 <b>traditionally</b> [1] 127:18 <b>tragic</b> [1] 87:8 <b>travel</b> [1] 143:17 <b>Treasury</b> [5] 44:3 148:15 154:6 155:5 207:6 <b>treat</b> [6] 22:13 24:10 32:9 95:1 139:19 181:6 <b>treated</b> [10] 6:10 29:22 59: 16 128:21 136:23,25 137: 22 138:9 181:1,3 <b>treaties</b> [9] 37:19 55:21 70: 2 91:17 92:15 93:4,24 161: 14 181:7 <b>treating</b> [3] 35:25 134:24 198:3 <b>treatment</b> [7] 26:14 114:10 175:4 189:5 194:2,18 195: 4 <b>treats</b> [1] 6:8 <b>treaty</b> [19] 14:12 17:4 22:2 26:24 28:18 38:5,7 51:15 71:17 81:13,16,19 83:19, 22 92:20 104:14 145:6 147:13 168:21 <b>trespassed</b> [1] 15:5 <b>trials</b> [1] 14:24 <b>tribal</b> [86] 2:15 3:14 9:11,13 14:12 16:22,25 17:9,19 18: 1,5 21:12 22:6,9,10 23:6 24:11,21,25 25:9 31:8 40: 17,17 41:9 43:4 45:4,9,10 50:8,8 55:25 72:5 73:9,11, 12 77:14 85:19 89:7,7,10 91:14 94:20 96:18 111:20 115:14 117:9,18 128:23	137:23 139:15 141:6 144: 9,10,13 145:7,8,17 148:22, 25 149:9,22,23 150:22 153: 9,11 154:21,25 156:16,23, 23 157:13 158:14 160:14, 15 162:20 163:24 177:11 179:10,18 182:10 194:3,11, 11 207:1,15,21 <b>tribe</b> [100] 9:18 11:25 12:4 17:5,6,10 18:11 23:5,18,22 24:15,15 25:17 26:23 28:2 29:23 30:2,4,5,20 31:9 34: 6,7,9,9 42:4 43:19 65:23 76:3 78:21 90:12 95:25 96: 2,21 97:13 109:6 114:4 116:7,14,16 118:8,21 119: 15 120:5,7,10 125:13 127: 14,15 128:13,22,25 130:3 131:21,24 133:6,8,8,12,12, 18,23 134:4,5 135:25 136: 2,22,24 137:5 138:5 140:7 142:18 143:3 144:10 145: 19 148:25 149:5 151:3,16, 21 153:7,12 159:2 169:22 170:15 171:5,10 172:10,11, 21 173:7 174:18 175:12 183:21 184:13 185:9 189: 11 197:11,16 206:8 <b>tribe's</b> [5] 14:11 26:22 30:7 109:8,8 <b>tribes</b> [108] 5:4 9:11 16:9, 11,13,15 17:24 18:14 19:3 22:1,3,13 25:4,4,7,14 26: 14 27:15,21 31:11,15,17 32:9 34:3 38:7 40:22 41:1 43:5,13 45:22 48:1,3,8 49: 13 51:8,12 52:16,21 53:3 55:19,21 70:6 71:7 76:10 77:19 92:5 93:17 94:21,23 104:7,23 105:13 109:11,12, 18 111:20 122:22 126:24 127:5,9 128:7,7 131:3,20 132:2,8 133:3 134:25 135: 7,10,14,14 136:18 137:11 139:14 140:12,14,17 144: 19 149:9 153:3 159:16,20 161:15 162:25 163:9,20,23 169:9,10 170:2,10,11 172: 6,16 174:17,19 175:18 176: 19 178:4,12,19 179:18 180: 25 181:14 184:10 193:25 205:9 <b>tribes'</b> [7] 17:2,12 28:17 41: 3 45:9 104:15 207:4 <b>trickier</b> [1] 192:17 <b>tricky</b> [2] 96:23 191:11 <b>tried</b> [2] 53:13 178:25 <b>trigger</b> [1] 129:5 <b>triggers</b> [1] 109:16 <b>trouble</b> [1] 119:10 <b>troubled</b> [1] 188:8 <b>true</b> [6] 48:12 64:21 78:24 132:5 135:16,19 <b>trump</b> [4] 5:5 116:18 119:	15 121:19 <b>trust</b> [21] 51:17,23 52:3,10, 15,23 75:9,19,24 76:2,7,12, 19,19 107:3 109:17 115:9 127:11,11 159:11 160:25 <b>try</b> [4] 5:2,7 111:10 116:2 <b>trying</b> [10] 33:2 53:18 61: 11 70:14 131:14 142:12 153:22 195:2,22 198:23 <b>turn</b> [6] 8:11 22:21 68:21 100:14 104:18 159:14 <b>turns</b> [2] 156:23 171:25 <b>turtles</b> [2] 188:12,13 <b>two</b> [50] 9:19 15:16 20:22 33:5 42:20 43:24 44:8 48: 18 59:18 63:8,17,24 64:2,3 65:14 66:14,23 73:4 74:15 88:2 91:5,15 94:17 95:12, 20 96:16 101:11,15,23 106: 19 109:5,5 115:4,11 122:5, 5 126:13 131:3,20 132:1 142:13 147:6 172:1 188: 23 192:1,5 194:15,15 201: 24 202:23 <b>Typically</b> [3] 67:13,16,19	14 148:10 149:18 156:11 157:15 172:4 173:21 191: 17 201:15 <b>understanding</b> [13] 31:19 47:3 49:3,21 51:18,20 55: 22 74:19 76:23 102:1 116: 1 147:21 160:19 <b>understood</b> [15] 14:1 15: 20 18:21 27:14 28:23 31: 24 33:16 62:3 64:17 70:3 72:12 75:17 85:9 96:7 140: 21 <b>undertake</b> [2] 197:8 200: 13 <b>unequally</b> [1] 59:16 <b>unfettered</b> [1] 142:21 <b>unfit</b> [2] 123:18,20 <b>unheard</b> [1] 137:8 <b>uniformly</b> [1] 141:4 <b>unilaterally</b> [3] 31:11 43: 20 128:24 <b>Union</b> [1] 65:25 <b>unique</b> [8] 58:5,17 104:8 105:23 106:8 109:19 175: 5 176:23 <b>UNITED</b> [29] 1:1 2:3 14:16 16:7 24:19 43:16 47:2 51: 7,7,20 54:10 64:17 75:19 76:9,15,20 77:6 85:6 89: 16 92:6 96:14 104:9 122:7 133:9 135:12 137:6 144: 14 170:12 172:15 <b>unity</b> [1] 104:22 <b>universities</b> [2] 44:12 150: 5 <b>Unless</b> [2] 90:20 110:18 <b>unlikely</b> [1] 187:22 <b>unlimited</b> [1] 16:15 <b>unmanageable</b> [1] 197:10 <b>unmet</b> [1] 88:21 <b>unqualified</b> [1] 74:6 <b>unreasonable</b> [1] 155:13 <b>unremarkable</b> [2] 37:21 173:6 <b>unsafe</b> [1] 87:9 <b>unshackled</b> [1] 101:22 <b>unsurprised</b> [1] 174:11 <b>untenable</b> [1] 139:11 <b>until</b> [2] 39:9 143:7 <b>unusual</b> [2] 60:4 149:3 <b>unwarranted</b> [3] 103:18 165:2 179:16 <b>up</b> [31] 6:7 31:2,4 32:20 41: 13 45:4 47:14 57:19 65:8 69:7 102:11,21 105:9 106: 23 112:10 114:19 122:6 125:9 128:7 129:4,25 132: 8 135:21 141:23 149:24 153:5,16 154:3 158:2 180: 17 184:9 <b>upheld</b> [5] 55:18 81:6,7 127:22 128:3 <b>upholding</b> [1] 108:14 <b>uprooting</b> [1] 103:24
---	--	---	---	--

## Official - Subject to Final Review

<p><b>upset</b> <sup>[1]</sup> 49:17</p> <p><b>urban</b> <sup>[1]</sup> 79:2</p> <p><b>uses</b> <sup>[4]</sup> 74:3 76:1 101:21 202:1</p> <p><b>using</b> <sup>[4]</sup> 53:25 75:2 180:23 184:22</p> <p><b>usual</b> <sup>[1]</sup> 106:13</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>vacating</b> <sup>[1]</sup> 21:15</p> <p><b>vaccine</b> <sup>[2]</sup> 122:8,23</p> <p><b>vaccines</b> <sup>[11]</sup> 111:16,20 112:2,11 113:4 114:4,5 115:13 123:5 177:13,20</p> <p><b>valid</b> <sup>[5]</sup> 104:2 110:17 115:17,17 139:24</p> <p><b>values</b> <sup>[1]</sup> 94:18</p> <p><b>valve</b> <sup>[2]</sup> 11:14,15</p> <p><b>variations</b> <sup>[1]</sup> 68:21</p> <p><b>varies</b> <sup>[1]</sup> 153:10</p> <p><b>variety</b> <sup>[2]</sup> 93:18 176:2</p> <p><b>various</b> <sup>[6]</sup> 70:18 88:8 106:3,4 108:6 144:24</p> <p><b>VAWA</b> <sup>[1]</sup> 94:8</p> <p><b>vegan</b> <sup>[1]</sup> 171:25</p> <p><b>vein</b> <sup>[1]</sup> 27:12</p> <p><b>verify</b> <sup>[3]</sup> 83:12 84:3,7</p> <p><b>version</b> <sup>[1]</sup> 54:18</p> <p><b>versus</b> <sup>[13]</sup> 4:5 19:6 20:25 22:6 48:23 54:9 56:21 60:8 64:17 66:3 71:3 124:14 201:16</p> <p><b>vessel</b> <sup>[2]</sup> 28:19 168:22</p> <p><b>vessels</b> <sup>[1]</sup> 77:6</p> <p><b>vicious</b> <sup>[1]</sup> 94:6</p> <p><b>view</b> <sup>[23]</sup> 31:21 32:2 34:25 35:6 36:9,22 44:5,13,24 48:14 60:7 87:3,14,15,17 105:20 111:17 134:22 170:9 174:12 176:6 187:12 189:9</p> <p><b>viewed</b> <sup>[1]</sup> 164:9</p> <p><b>views</b> <sup>[5]</sup> 87:18 88:4 165:25 166:1 202:18</p> <p><b>vindicate</b> <sup>[1]</sup> 41:12</p> <p><b>violate</b> <sup>[4]</sup> 58:16 60:15 78:13 83:21</p> <p><b>violates</b> <sup>[2]</sup> 58:12 61:4</p> <p><b>violating</b> <sup>[2]</sup> 58:1 59:1</p> <p><b>violation</b> <sup>[15]</sup> 6:17,22 32:16,17 61:2,4 63:16 68:16 83:8 86:4,6,8,21 111:17 139:9</p> <p><b>violations</b> <sup>[1]</sup> 59:15</p> <p><b>violative</b> <sup>[1]</sup> 58:15</p> <p><b>violence</b> <sup>[1]</sup> 94:7</p> <p><b>Virginia</b> <sup>[3]</sup> 56:21,24,25</p> <p><b>virtually</b> <sup>[1]</sup> 78:19</p> <p><b>vis-à-vis</b> <sup>[2]</sup> 50:14 195:2</p> <p><b>vital</b> <sup>[5]</sup> 17:22 96:17 103:21 105:6 136:9</p> <p><b>voluntarily</b> <sup>[1]</sup> 136:21</p> <p><b>voluntary</b> <sup>[1]</sup> 198:24</p> <p><b>volunteered</b> <sup>[1]</sup> 62:23</p>	<p><b>volunteering</b> <sup>[1]</sup> 63:4</p> <p><b>vote</b> <sup>[1]</sup> 27:25</p> <p><b>vulnerable</b> <sup>[2]</sup> 98:2 177:17</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wait</b> <sup>[2]</sup> 84:10 172:18</p> <p><b>walk</b> <sup>[8]</sup> 91:20,22,25 97:7,11 197:4,13 200:16</p> <p><b>walking</b> <sup>[1]</sup> 198:9</p> <p><b>wanted</b> <sup>[1]</sup> 24:5</p> <p><b>wants</b> <sup>[3]</sup> 107:23 142:19 176:16</p> <p><b>war</b> <sup>[4]</sup> 104:14 147:13 159:15 172:7</p> <p><b>ward</b> <sup>[1]</sup> 76:7</p> <p><b>Washington</b> <sup>[4]</sup> 1:24 2:7,12,14</p> <p><b>way</b> <sup>[53]</sup> 30:5,24 44:21 50:6 52:6 63:21 65:10 68:1 74:10 75:5 81:19 98:8 100:11 101:6 103:3 106:17 107:18 110:25 113:22 115:7 118:2,3 120:2,18 128:10 140:14 141:20 142:20 144:17,17 155:11 157:5,13 162:1,12 163:17 165:1,8,19,21 169:11 174:6,11 177:22 178:8 184:9 188:12 190:4 193:16 195:1 202:5 203:3,8</p> <p><b>ways</b> <sup>[8]</sup> 6:2 52:11 106:21 121:7 142:5 174:13 201:6,24</p> <p><b>wayside</b> <sup>[1]</sup> 12:15</p> <p><b>Wednesday</b> <sup>[1]</sup> 1:25</p> <p><b>weeds</b> <sup>[1]</sup> 18:16</p> <p><b>Weeks</b> <sup>[1]</sup> 66:4</p> <p><b>weigh</b> <sup>[2]</sup> 12:3 160:4</p> <p><b>weighing</b> <sup>[1]</sup> 12:6</p> <p><b>weight</b> <sup>[5]</sup> 120:22 129:6,8 160:11,17</p> <p><b>welcome</b> <sup>[2]</sup> 5:18 56:11</p> <p><b>Welfare</b> <sup>[17]</sup> 4:14 30:14 87:12 98:2 103:16,23 108:9 117:1 119:3 121:25 125:16 129:19 140:21 160:23 161:22 162:8 182:2</p> <p><b>West</b> <sup>[3]</sup> 56:20,24,25</p> <p><b>Western</b> <sup>[2]</sup> 71:3 89:16</p> <p><b>whatever</b> <sup>[8]</sup> 65:11 79:16 81:12 107:22 116:5 122:25 157:25 176:15</p> <p><b>whatsoever</b> <sup>[1]</sup> 88:7</p> <p><b>Whereupon</b> <sup>[1]</sup> 208:7</p> <p><b>wherever</b> <sup>[6]</sup> 14:15 16:6 31:9 34:3 76:21 168:18</p> <p><b>whether</b> <sup>[60]</sup> 6:21 8:2,4 10:16,21 12:10,10 14:5,24 15:14 18:18 19:2 25:16 27:7 28:9 47:15 48:14 49:24 53:18 58:3 67:6 68:11 81:18 87:16,23,24 88:13 91:8,9,19 93:3,4 106:1,15,15 111:21,22 115:4,6,19 121:15</p>	<p>123:5,6 126:19 139:23 146:19 147:16 151:9,9 156:25 160:11 165:15,16,18 187:19,23 190:6 198:19 199:20 207:16</p> <p><b>white</b> <sup>[7]</sup> 14:21 75:12 95:5,6 132:14,14 155:24</p> <p><b>who's</b> <sup>[4]</sup> 131:19 142:14 143:1 179:25</p> <p><b>who've</b> <sup>[1]</sup> 41:13</p> <p><b>whoa</b> <sup>[1]</sup> 182:4</p> <p><b>whoever</b> <sup>[1]</sup> 109:15</p> <p><b>whole</b> <sup>[6]</sup> 23:13 29:4 33:15 47:2 101:20 177:15</p> <p><b>wholesale</b> <sup>[2]</sup> 166:23 179:16</p> <p><b>whom</b> <sup>[2]</sup> 34:9 145:16</p> <p><b>whomever</b> <sup>[1]</sup> 67:4</p> <p><b>widespread</b> <sup>[1]</sup> 103:15</p> <p><b>will</b> <sup>[23]</sup> 4:3 37:24 43:25 76:1 86:19 96:20 101:20 111:25 124:3 133:11 136:4 143:4 164:12,13 165:12 167:6 171:19 183:15 187:6 197:17 203:18 207:17,23</p> <p><b>Williams</b> <sup>[3]</sup> 19:5 43:6 48:22</p> <p><b>willing</b> <sup>[2]</sup> 203:24,25</p> <p><b>willingly</b> <sup>[1]</sup> 62:25</p> <p><b>win</b> <sup>[1]</sup> 176:7</p> <p><b>Wisconsin</b> <sup>[2]</sup> 76:3,4</p> <p><b>wished</b> <sup>[1]</sup> 90:5</p> <p><b>wishes</b> <sup>[3]</sup> 76:21 138:13 192:23</p> <p><b>withhold</b> <sup>[1]</sup> 57:18</p> <p><b>within</b> <sup>[22]</sup> 14:1 16:7 18:3 19:3 35:17,21 37:1 38:8,10,15 43:17 55:23 71:25 72:11 80:1 100:22 113:6 115:15 147:1 155:23 158:1 166:24</p> <p><b>without</b> <sup>[3]</sup> 34:8 40:7 163:16</p> <p><b>woefully</b> <sup>[1]</sup> 88:21</p> <p><b>woman</b> <sup>[2]</sup> 14:20 85:13</p> <p><b>women</b> <sup>[1]</sup> 75:12</p> <p><b>wonder</b> <sup>[1]</sup> 160:10</p> <p><b>wondering</b> <sup>[4]</sup> 28:9 33:18 144:23 145:12</p> <p><b>word</b> <sup>[6]</sup> 14:4 23:10 101:21 102:22 180:4 195:15</p> <p><b>words</b> <sup>[5]</sup> 5:12 11:18 19:15 82:6 116:12</p> <p><b>work</b> <sup>[11]</sup> 5:23 11:23 46:19 90:16 97:11 100:7 116:1 120:14 149:1 190:1 196:10</p> <p><b>worked</b> <sup>[1]</sup> 105:6</p> <p><b>working</b> <sup>[1]</sup> 139:14</p> <p><b>works</b> <sup>[10]</sup> 46:6 61:11 119:11 133:20 164:7 165:18,24 195:22 196:19 203:21</p> <p><b>world</b> <sup>[12]</sup> 113:17 184:15,25 185:2,6 190:14,23 196:</p>	<p>19 202:21 203:1 206:17,21</p> <p><b>worried</b> <sup>[4]</sup> 49:6 99:3,19 177:6</p> <p><b>worrying</b> <sup>[1]</sup> 171:9</p> <p><b>worst</b> <sup>[1]</sup> 163:17</p> <p><b>worthy</b> <sup>[1]</sup> 140:12</p> <p><b>wrapped</b> <sup>[3]</sup> 31:2,4 65:8</p> <p><b>writ</b> <sup>[2]</sup> 24:6 205:16</p> <p><b>write</b> <sup>[3]</sup> 70:13,14 71:12</p> <p><b>written</b> <sup>[1]</sup> 137:17</p> <p><b>wrongs</b> <sup>[1]</sup> 33:5</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>year</b> <sup>[2]</sup> 4:24 204:14</p> <p><b>years</b> <sup>[21]</sup> 5:8,15 41:15 75:6 78:6 103:20 110:16 129:18 135:14 139:13,16 141:1 147:23 150:6,6 177:3 180:19 191:6,20 192:6 199:2</p> <p><b>York</b> <sup>[2]</sup> 54:9 64:17</p> <p><b>young</b> <sup>[1]</sup> 153:18</p> <p><b>younger</b> <sup>[1]</sup> 192:15</p> <p><b>YRJ</b> <sup>[9]</sup> 5:7 12:9 18:14 53:5 97:15 204:19 205:19 207:16,24</p> <p><b>YRJ's</b> <sup>[2]</sup> 5:13 204:18</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p><b>zero</b> <sup>[1]</sup> 208:1</p>
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